Supreme Court, U.S.
FILED

96 760 NOV 4 1996

OFFICE OF THE CLERK

No. _____

In the
Supreme Court of the United States
October Term, 1996

Brian L. Honn,

Petitioner,

v.

R.J. Steichen & Company and John E. Feltl,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

Rebecca E. Bender
Counsel of Record
Bender & Ford, P.A.
Minnesota Law Center
514 Nicollet Mall
Suite 570
Minneapolis, Minnesota 55402
(612) 332-6220

Attorneys for Petitioner

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

QUESTIONS PRESENTED

1) Whether a state court may directly or indirectly decide exclusively federal court claims, after the state court is placed on notice that the jurisdiction of the federal court has been invoked.

2) Whether the approximately one-half million securities brokers in the United States who, pursuant to a Form U-4, are required to arbitrate disputes with their employers in an NASD (National Association of Securities Dealers, Inc.) forum as a condition to having their applications for licensing approved, still maintain the right to pursue exclusively federal court claims against the NASD in federal court.

3) Whether the likely collateral estoppel effect of a state court's ruling on pending exclusively federal court constitutional and antitrust claims should result in a state court's stay of its proceedings, pending the federal court and jury's determination of exclusively federal court claims.

4) Whether a securities broker, who believes his constitutional rights have been and continue to be violated in the NASD arbitration forum where he is required to have his dispute with his employer heard, may be compelled to continue going back to that forum once he has invoked the jurisdiction of the federal court on exclusively federal court claims being brought against the NASD, and once the NASD forum has been found three times by a state court to be prejudiced to him.

5) Whether there is a direct right of appeal from a state court order which does more than just compelling arbitration,

i.e., it determines exclusively federal court claims and seeks to send a securities broker back for the fourth time to a forum found to be prejudicial to him three times previously.

LIST OF PARTIES

All parties to this Petition are listed in the caption.

RULES 29.1 LIST

Petitioner is not aware of any parent or subsidiary company to the captioned parties.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 3

STATUTES INVOLVED 3

STATEMENT OF CASE 4

REASONS FOR GRANTING THE WRIT 8

CONCLUSION 13

APPENDIX TABLE OF CONTENTS ..... A-i

APPENDIX A-1

TABLE OF AUTHORITIES

United States Supreme Court Decisions

Colorado River Water Conservation Dist. v. United States., 424 U.S. 800 (1976) 13

Gibson v. Berryhill, 411 U.S. 564 (1973) 10

United States Circuit Court of Appeals Decisions

Austin Municipal Securities, Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985) 9

First Jersey Securities v. Bergen, 605 F.2d 690 (3d Cir. 1979) 10

State Court Decisions

AMF Pinspotters v. Harkins Bowling, Inc., 110 N.W.2d 348 (Minn. 1961) 11

Book Tower Garage v. Local No. 415 Intern. Union, United Auto Workers of America, 295 N.W. 320 (Mich. 1941) 12

Eckblad v. Farm Bureau Mutual Insurance Co., 371 N.W.2d 78 (Minn. Ct. App. 1985), pet. for rev. denied (Minn. Sept. 26, 1985) 11

General Talking Pictures Corp. v. DeMarce, 279 N.W. 750 (Minn. 1938) 11

Miyoi v. Gold Bond Stamp Company Employees Retirement Trust, 196 N.W.2d 309, 310 (Minn. 1972) 12

Moreland Corp. v. Retail Store Employees Union, 114 N.W.2d 976 (Wis. 1962) 12

State for Benefit of Employees of State Penitentiary v. Jensen, 331 N.W.2d 42 (N.D. 1983) 12

Watling, Lerchen and Company, Inc. v. Ormond, 272 N.W.2d 614 (Mich. App. 1978) 12

Statutes and Rules

Fifth Amendment to the United States Constitution 3, 9-13

15 U.S.C. § 1 ..... 3, 9-13

15 U.S.C. § 2 ..... 4, 9-13

15 U.S.C. § 78(a) 4

15 U.S.C. § 78(o)-3 4

15 U.S.C. § 78(o)-3(b)(9) 9

15 U.S.C. § 78(s) 9

15 U.S.C. § 78(s)(g)(1) 9

28 U.S.C. § 1257 3

Supreme Court Rule 13.1 3

INTRODUCTION

Petitioner Brian L. Honn ("Honn") is a securities broker licensed by the National Association of Securities Dealers, Inc. ("NASD"). As a condition of licensing, Mr. Honn, like approximately one-half million other securities brokers in the United States, is required to agree to arbitrate before the NASD any and all disputes which may arise with his employers, (Respondents).

Petitioner Honn prays that this Court issue a Writ of Certiorari to review the orders of the Minnesota Supreme Court and Court of Appeals. The Minnesota Appellate Courts refused to review the Order of the Hennepin County District Court, which lifted its stay of NASD arbitration in the matter of Honn v. Steichen, after being placed on notice of Mr. Honn's having filed exclusively federal court claims against the NASD in the United States District Court and after the NASD forum had already been found three times to be prejudicial to Honn. In issuing its Order, the Hennepin County District Court effectively decided Honn's exclusively federal court claims, due to the collateral estoppel effect of the State Court's decision.

OPINIONS BELOW

On January 20, 1995, the Hennepin County District Court for the State of Minnesota granted Brian Honn's Motion for Vacatur of the NASD arbitration decision in Honn v. Steichen, finding, inter alia, that there was prejudice and bias to Honn when an acting NASD official testified voluntarily, without a valid subpoena, and contrary to NASD published policy, on behalf of NASD member R.J. Steichen in an NASD forum, with NASD-appointed arbitrators. The Court remanded the case to the New York City Arbitration Office of the NASD,

for non-Minnesota arbitrators to decide this case. (Exhibit A, at A-1.)

After numerous delays, a new NASD panel was finally appointed. However, counsel to the Steichen Defendants advised the panel in writing, over Honn's objections to the NASD, of the outcome of the previous arbitration award, which was the result of the prejudiced hearing. When the NASD denied Honn's challenges for cause regarding the now tainted arbitration panel, on October 13, 1995, the Hennepin County District Court for the State of Minnesota granted Honn's Motion removing the tainted arbitrators and ordering the appointment of a third panel. (Exhibit B, at A-9.)

After Steichen's counsel indicated that he intended to call a former NASD supervisor of the Steichen Respondents as an "expert" for Steichen in the third scheduled NASD re-arbitration and the NASD refused to produce key documents regarding this supervision, while tacitly approving the supervisor's testifying, Honn brought an expedited ex parte motion in Hennepin County District Court to stay the re-arbitration until after the filing of a federal court action against the NASD. This motion was granted by the State Court on November 2, 1995. (Exhibit C, at A-12.)

On April 11, 1996, the Hennepin County District Court lifted its stay of the arbitration, upon motion from Steichen, apparently due to Steichen's counsel advising the Court that he had hired a different expert. The Hennepin County Court, though placed on notice prior to its decision of the fact that Honn had filed exclusively federal court claims against the NASD, still retained jurisdiction over this matter. Therefore, in sending Honn back to NASD arbitration, the State Court directly or indirectly decided exclusively federal court claims. (Exhibit E, at A-21.)

On June 11, 1996, the Minnesota Court of Appeals issued an order denying Honn's Motion for Direct or Discretionary Review. (Exhibit P, at A-150.) On August 6, 1996, the

Minnesota Supreme Court issued an order denying Honn's Petition for Review. (Exhibit R, at A-160.)

On October 21, 1996, United States Magistrate Judge John Mason confirmed the collateral estoppel effect of the State Court's ruling on Honn's exclusively federal court claims in his Report and Recommendation. (Exhibit S, at A-161.)

STATEMENT OF JURISDICTION

The Order of the Minnesota Supreme Court denying discretionary review was entered on August 6, 1996. This Petition for Writ of Certiorari is being filed within ninety days of that date. U.S. Supreme Court Rule 13.1. This Court has jurisdiction pursuant to 28 U.S.C. § 1257 to review the Order of the Minnesota Supreme Court by Writ of Certiorari, as Honn's claims under the United States Constitution and antitrust laws are at stake.

STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall . . . be deprived of life, liberty or property, without due process of law . . . .

15 U.S.C. § 1 provides in relevant part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal . . . .

15 U.S.C. § 2 provides in relevant part:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony . . . .

STATEMENT OF CASE

On June 16, 1993, Petitioner Brian L. Honn filed an arbitration proceeding against his former employer, NASD[1] licensed member R.J. Steichen & Company ("Steichen"), and its President John E. Feltl ("Feltl"). As a securities broker licensed in the United States, Brian Honn was required to have his claims against his former employer arbitrated in an NASD forum.[2]

On October 25, 1994, Mr. Honn filed a Motion to Vacate the NASD Arbitrators' Award in Hennepin County District Court for the State of Minnesota due, primarily, to prejudice

---

[1] The NASD is a federal self-regulatory organization ("SRO") established pursuant to the Maloney Act, 52 Stat. 1070 (1938), 15 U.S.C. section 78 (o)-3, et. seq. amending the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. section 78(a), et. seq.

[2] In order for a broker such as Petitioner Brian Honn to gain employment in the securities industry with an NASD licensed firm, he is required to sign a Form U-4 agreement. This form provides, in relevant part, that any and all disputes which an individual securities broker may have with his/her NASD member-firm employer must be arbitrated before a panel appointed by the NASD, in an NASD arbitration forum, pursuant to the NASD Code of Arbitration Procedure. In other words, individual securities brokers like Petitioner Brian Honn cannot proceed through the court system or through any non-NASD forum to have their disputes with former employers heard.

and bias in the arbitration hearing. The Honorable Delila F. Pierce granted Honn's Motion to Vacate on January 20, 1995, finding that Honn was in fact denied a non-prejudiced, non-biased hearing.

The clear prejudice which the District Court saw in this matter resulted from, among other things, an acting NASD official testifying on behalf of the Steichen Respondents as an expert witness in an NASD forum, before arbitrators appointed by the NASD, not pursuant to a valid subpoena and contrary to published NASD policy. In her Order, Judge Pierce stated in relevant part:

> Allowing an NASD employee to testify as an expert on behalf of the defendants [NASD dues paying member Steichen] in an NASD proceeding, where the NASD selects the arbitrators to hear a particular dispute, presents at the very least bias and prejudice . . . . Clearly, admitting such testimony raises questions both as to the fairness of this proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with an NASD employee.

January 20, 1995 Order. (Exhibit A, at A-1.)

Problems with the NASD forum persisted, as Honn continued to bear the financial burden and time delays in attempting to have his case reheard in a non-prejudiced, non-biased forum. For example, the NASD provided information from Steichen's counsel concerning the outcome of the first prejudiced hearing to the newly appointed arbitration panel, over Honn's objections. Then the NASD refused to remove the tainted panel. This necessitated Honn returning to State Court to seek an Order removing the "new" panel. The Hennepin County Court issued this Order on October 13, 1995. (Exhibit B, at A-9.)

Respondent Steichen's counsel informed Petitioner Honn's counsel that at the third attempt at re-arbitration of the Honn v. Steichen case, he intended to call Richard Rush as an expert witness. Rush is the former Assistant District Director of the NASD Kansas City office, who left the NASD in approximately May of 1995, less than six months before the re-hearing of this matter was to proceed. Mr. Rush was the number two person, second only to the NASD District Director, who had disciplinary authority over the Honn v. Steichen Respondents, R.J. Steichen & Company and its principals, including Respondent John Feltl.

On November 2, 1995, Thomas P. Moran, an attorney in the General Counsel's office of the NASD, sent two letters via telefax, indicating, inter alia, that Rush would be allowed to testify on NASD member Steichen's behalf, though the NASD refused to produce key documents to Honn relating to Rush's supervision over NASD member Steichen.

Petitioner Honn, through his counsel, advised the Hennepin County Court that he intended to sue the NASD due to his inability to have his claims heard in a non-prejudiced forum. On November 2, 1995, counsel for Petitioner Brian Honn brought an expedited ex parte motion to stay the rehearing of the Honn v. Steichen arbitration. Judge Pierce issued another Order on this date stating in relevant part:

> That [as] similar issues to those which required the vacatur previously are now present again, this Court is hereby ordering that the rehearing of the arbitration be and hereby is stayed pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and nonprejudiced hearing.

November 2, 1995 Order (Emphasis Added). (Exhibit C, at A-12.)

On January 23, 1996, District Court Judge Pierce, though denying Honn's Motion for Sanctions against Steichen and its counsel, again addressed the prejudicial nature of the NASD forum to Honn, stating:

> . . . once the Court's general equity jurisdiction has been invoked, it may stay an arbitration proceeding on the ground of bias or prejudice. To permit arbitration to proceed under such circumstances would be futile since the award would almost certainly be vacated. Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (1989) . . . .
>
> . . . The Court has been asked to stay an arbitration proceeding in a forum which has previously been found, by this Court, to be prejudicial to him and which, in all likelihood, based upon the facts presented to the Court will be again . . . .

January 23, 1996 Order (Emphasis Added). (Exhibit D, at A-13.)

On February 28, 1996, after Steichen brought a Motion to Lift the Stay, Honn notified the Court, via affidavit, of the litigation which he had commenced against the NASD and the Securities and Exchange Commission on constitutional, antitrust and other bases, due to his (Honn's) continuing inability to receive a non-prejudiced hearing. (Exhibit G, at A-31.)

On April 11, 1996, the District Court lifted its stay of the NASD arbitration.[3] (Exhibit E, at A-21.) Judge Pierce,

---

[3] Judge Pierce lifted the stay of arbitration upon being advised that Former Assistant District Director of the NASD for District IV, Richard Rush, had withdrawn as an expert witness for broker/dealer Steichen in the Honn v. Steichen matter.

however, failed to address the issues concerning Honn's pending exclusively federal court claims and his right to have them heard in federal court. The Hennepin County Court also failed to address the collateral estoppel effect which its ruling was likely to have on Honn's federal court claims.

On May 15, 1996, Honn filed his Notice of Appeal with the Clerk of Appellate Courts. (Exhibit J, at A-120.) The Minnesota Court of Appeals declined to review the direct appeal as a matter of right, though crucial issues in addition to merely compelling arbitration were directly and indirectly decided by the State Court. The Minnesota Court of Appeals also denied Honn's Petition for Discretionary Review. (Exhibit P, at A-150.)

In a one sentence Order dated August 6, 1996, the Minnesota Supreme Court also apparently failed to recognize the importance of safeguarding Mr. Honn's exclusively federal court claims. (Exhibit R, at A-160.)

REASONS FOR GRANTING THE WRIT

There are two primary reasons for granting this Writ. First, a State Court must not be allowed, directly or indirectly to decide exclusively federal court claims once the jurisdiction of the federal courts has been invoked. The potential danger of a collateral estoppel effect from the State Court's decision has become a reality in this case.

Second, a Writ of Certiorari should be granted in this case because the power of the NASD to favor its member firms in potentially high-dollar cases, to prejudice the forum in which individual brokers like Honn are required to bring their claims, and to deny due process to the one-half million non-NASD member securities brokers has gotten out of hand.

The Securities Exchange Act of 1934 provides for a system of federal regulation of the securities industry. The

Maloney Act established guidelines for the formation and oversight, by the Securities and Exchange Commission ("SEC"), of self-regulatory organizations such as the NASD. The United States Congress delegated power to the NASD and the registered stock exchanges to enforce compliance by members of the industry with both the legal requirements laid down in the Exchange Act and the ethical standards going beyond those requirements.

Every self-regulatory organization, including the NASD, must comply with the provisions of the Exchange Act, its own rules and the rules of both the SEC and the Municipal Securities Rule Making Board. 15 U.S.C. § 78s(g)(1). The SEC must approve all association rules, policies, practices and interpretations prior to their implementation. 15 U.S.C. § 78s. These rules may not impose a burden on competition not necessary or appropriate to further the purposes of the Exchange Act. 15 U.S.C. § 78o-3(b)(9). See Austin Municipal Securities Inc. v. National Association of Securities Dealers, Inc., 757 F.2d 676 (5th Cir. 1985).

The NASD is far from perfect in its self-regulating responsibilities. Recently, the SEC uncovered a failure by the NASD to properly regulate its member broker-dealer firms engaged in market making activities.

Mr. Honn has alleged violations of the Sherman Act, as well as the Fifth Amendment to the United States Constitution in his federal court complaint against the NASD, due primarily to Honn's inability to obtain a non-prejudiced, non-biased hearing on his claims against his former employer. Not surprisingly, Honn's claims, primarily based on defamation, are the type most feared by broker-dealer NASD members, because of the potential for high dollar awards, many in excess of one million dollars.

NASD arbitration between individual brokers and their former employers is not a voluntary system. If the broker wishes to sell securities through an NASD licensed broker-

dealer, he is not allowed to cross out the provision on his Form U-4 which requires him to arbitrate all claims though NASD arbitration. Further, under existing NASD rules, NASD present employees (including NASD "rule makers") or past employees with direct disciplinary oversight over parties to an arbitration are apparently only allowed to give testimony as expert witnesses on behalf of NASD member-firms.

The case at bar is akin to those which analyze whether a structural bias exists in the NASD system, as overseen and approved by the SEC. In First Jersey Securities, Inc. v. Bergen, 605 F.2d 690 (3d Cir. 1990), the brokerage firm claimed that there was structural bias in the disciplinary proceedings of the NASD which resulted in its being unable to conduct a fair hearing before an impartial tribunal in the disciplinary context. First Jersey relied upon this Court's ruling in Gibson v. Berryhill, 411 U.S. 564 (1973), which affirmed the district court's conclusion that the procedures of the Alabama Board of Optometry for revocation of licenses amounted to a deprivation of due process, as "those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes," Id., at 579.

Though the Third Circuit in First Jersey found no structural bias in the NASD's disciplinary procedures, it appears that it would reach a different conclusion, based upon the reasoning in First Jersey, regarding the structural bias in Honn's arbitration, between a brokerage firm employee and his former employer. Perhaps most significantly, the court in First Jersey found that neither the NASD nor the industry it regulates is divided into factions or identifiable groups in a manner comparable to the independent practitioners versus the optometrists employed by corporations in Gibson. Such is not the situation in the case at bar. In NASD broker-broker arbitrations, there are two real and separate factions: namely the employers, who are dues paying members of the NASD, and the employee-brokers, who are not.

The Honn Federal Court Complaint (A-33 through A-109) sets forth facts with which no court has ever been presented. Therefore, any "floodgates" argument fails on its face. Petitioner is not alleging that the entire arbitration system is flawed. Rather, Mr. Honn is alleging that he is unable to obtain a fair, non-prejudiced hearing before the NASD. The Minnesota Court of Appeals failed to address the very basic and key fact that Mr. Honn's constitutional rights and rights pursuant to the federal antitrust laws raised against the NASD were being determined by a state court, which operated to effectively eliminate Honn's right to pursue these claims in the court of exclusive jurisdiction.

To state that the Hennepin County Judge's Order sending this matter back for a fourth time to the NASD, in light of these pending allegations in federal court, does not determine the merits of the claim in the arbitration proceeding, is to ignore the forest for the trees. See Eckblad v. Farm Bureau Mutual Ins. Co., 371 N.W.2d 78 (Minn. Ct. App. 1985) pet. for rev. denied (Minn. Sept. 26, 1985). Here, the ultimate question in the federal court action, namely whether Mr. Honn's rights to a non-prejudiced hearing have been and are continuing to be undermined, is one of the issues which Hennepin County Judge Pierce implicitly (if not explicitly) decided.

Another "fact" which was not addressed by the Minnesota Court of Appeals is the preemption issue. To force Honn to go back to arbitration in a forum which he believes violates his constitutional rights and the antitrust laws is, in effect, taking away his rights. In AMF Pinspotters v. Harkins Bowling, Inc., 110 N.W.2d 348 (Minn. 1961), the Minnesota Supreme Court, citing General Talking Pictures v. DeMarce, 279 N.W. 750 (Minn. 1938), held that issues arising under federal antitrust laws are exclusively within the jurisdiction of the federal courts. Many other courts have recognized that state courts, as well as federal courts, have a duty to guard and

enforce every right secured by the Constitution. Book Tower Garage v. Local No. 415 Intern. Union, United Auto. Workers of America, 295 N.W. 320 (Mich. 1941); see also State for Benefit of Employees of State Penitentiary v. Jensen, 331 N.W.2d 42 (N.D. 1983); and Watling, Lerchen and Company, Inc. v. Ormond, 272 N.W.2d 614 (Mich. App. 1978), which held, inter alia, that where a duty was created by the Securities Exchange Act of 1934, federal courts have exclusive jurisdiction.

The Minnesota Court of Appeals also did not address the fact that the Hennepin County District Court was on notice concerning the constitutional, antitrust and other claims which had been raised by Honn prior to the District Court ordering Mr. Honn back to the forum which violates his rights. Moreland Corp. v. Retail Store Employees Union, 114 N.W.2d 976 (Wis. 1962).

Finally, the Minnesota Court of Appeals refused to grant discretionary review of what it considered to be a non-final order, due to the fact that it believed Mr. Honn had not established irreparable damage, citing to Miyoi v. Gold Bond Stamp Company Employees Retirement Trust, 196 N.W.2d 309, 310 (Minn. 1972). The Court of Appeals held that there would not be a potential collateral estoppel effect of the April 11, 1996 Order on Honn's claims in the pending federal district court action.

However, this "collateral estoppel effect" has already begun to occur. In federal court, at a hearing on the NASD's Motion to Dismiss Mr. Honn's federal court Complaint, United States Magistrate Judge Mason indicated that he intends to abide by the Order of Hennepin County District Court Judge Pierce on whether the NASD forum is prejudiced or not. (Exhibit O, at A-140.) This is as close as one can get to an admission that the state court is determining the exclusively federal constitutional and antitrust claims raised by Mr. Honn in federal court. See Report and Recommendation

of United States Magistrate Judge Mason (Exhibit S, at A-161), which is further evidence of the collateral estoppel effect of the State Court's Order on Honn's exclusively federal court claims.

CONCLUSION

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law. The Sherman Act seeks to protect individuals from antitrust violations.

Claims brought under the Sherman Act and the Constitution must be heard in federal court. Federal courts have a "virtually unflagging obligation" to exercise their jurisdiction. Colorado River Water Conservation Dist. v. United States., 424 U.S. 800, 817 (1976).

Though there are strong policies favoring arbitration, there are even stronger policies to protect exclusively federal court claims. The NASD is not a party in the Honn v. Steichen NASD-sponsored arbitration. It is not for the arbitrators or a State Court to decide federal court claims against the NASD.

For a State Court, placed on notice of pending exclusively federal court claims to lift a stay of arbitration, thereby denying the rights of Petitioner Honn to proceed in federal court, is to say that these federal court claims are insignificant. For the Minnesota Court of Appeals and Minnesota Supreme Court to refuse to examine this ruling is very troublesome. For the Federal Court to admit to its reliance on the State Court's decision concerning exclusively federal court claims should be a flashing red danger sign to this Honorable Court.

Petitioner Brian Honn is just one of approximately one-half million brokers nationwide who are required to arbitrate their claims against NASD member firms in an NASD forum before NASD-appointed arbitrators. In light of the history of

this case, and Mr. Honn's demonstrated patience with an obviously flawed system, he, more than many, deserves his day in federal court. Mr. Honn should not be required to continue to bankrupt himself in his search for justice in a prejudiced and biased forum, which by its nature also violates federal antitrust laws.

Mr. Honn respectfully requests that this Petition for Writ of Certiorari be granted.

Dated: November 4, 1996

Rebecca E. Bender
Counsel of Record
Bender & Ford, P.A.
Minnesota Law Center
514 Nicollet Mall
Suite 570
Minneapolis, Minnesota 55402
(612) 332-6220

Attorneys for Petitioner

APPENDIX

TABLE OF CONTENTS

January 20, 1995 State District Court Order Vacating Arbitration Award (Exhibit A) A-1

October 13, 1995 State District Court Order appointing new panel of arbitrators and prohibiting NASD parties or their counsel from providing information concerning the previous hearing to the newly appointed panel (Exhibit B) A-9

November 2, 1995 State District Court Order staying the rehearing of the NASD arbitration "pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and nonprejudiced hearing" (Exhibit C) A-12

January 23, 1996 State District Court Order denying Plaintiff's Motion for Sanctions and to strike untimely filings (Exhibit D) A-13

April 11, 1996 State District Court Order granting Defendants' Motion to Compel Arbitration and denying Defendants' Motion for Sanctions (Exhibit E) A-21

April 16, 1996 Amended State District Court Order due to clerical error in date of hearing (date is still inaccurate, hearing was March 4, 1996) (Exhibit F) A-26

February 28, 1996 State District Court Affidavit of Rebecca E. Bender, counsel to Brian Honn with Federal Court Complaint and attachments attached to Affidavit (Affidavit and attachments indicating pending Federal Court action was filed with the Minnesota District Court prior to the hearing on Steichen's Motions, which resulted in April 11 and April 16, 1996 Orders of State District Court) (Exhibit G) A-31

November 2, 1995 Honn's Memorandum in Support of State District Court Motion to Stay Arbitration Proceedings (Exhibit H) A-110

January 15, 1996 Letter from Honn's Counsel to State District Court Administrator, copied to District Court Judge Pierce and opposing counsel (Exhibit I) A-117

May 15, 1996 Honn's State Court of Appeals Notice of Appeal (Exhibit J) A-120

May 15, 1996 Honn's State Court of Appeals Statement of the Case (Exhibit K) A-122

May 24, 1996 Honn's Notice of Motion and Motion for Permission to File Petition For Discretionary Review with Minnesota Court of Appeals (Exhibit L) A-129

May 24, 1996 Honn's Memorandum in Support of Motion for Permission to File Petition For Discretionary Review with Minnesota Court of Appeals (Exhibit M) ... A-131

May 24, 1996 Honn's Memorandum in Opposition to Respondents' Motion to Dismiss For Lack of Jurisdiction (Exhibit N) A-133

June 7, 1996, Portion of Motion to Dismiss Hearing Before United States Magistrate Judge John M. Mason Referring to Collateral Estoppel Effect of State Court Ruling on Exclusively Federal Court Claims (Exhibit O) A-140

June 11, 1996 Minnesota Court of Appeals Order Refusing to Review State District Court Decision (Exhibit P) A-150

July 10, 1996 Honn Petition for Review of Decision of State Court of Appeals (Exhibit Q)..... A-153

August 6, 1996 Minnesota Supreme Court Order Refusing to Review Minnesota Court of Appeals Decision (Exhibit R) A-160

October 21, 1996 United States Magistrate Judge John M. Mason's Report and Recommendation (Exhibit S)..... A-161

EXHIBIT A

STATE OF MINNESOTA DISTRICT COURT
COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff, **ORDER AND MEMORANDUM**
File No. CT 94-15904

v.

R.J. Steichen and Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 15th of December, 1994, on Plaintiff's motion to vacate arbitrators' award and Defendants' motion to confirm arbitration award at the Hennepin County Government Center, Minneapolis, Minnesota.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Plaintiff's motion to vacate the arbitrators' award pursuant to Minn. Stat. §572.19 and 9 U.S.C. §10 is granted.

2. This arbitration matter is remanded to the New York City Arbitration office of the National Association of Securities Dealers, Inc., Attention: Deborah Massuci, Director of Arbitration. Non-Minnesota arbitrators shall be appointed to decide this matter upon rehearing.

3. Plaintiff's request for attorneys' fees is granted in the amount of $300.00.

4. Defendant's request for attorney's fees is denied.

5. The attached Memorandum is incorporated herein and made a part of this order.

BY THE COURT:

Dated: January 20, 1995.

s/s
Delila F. Pierce
Judge of District Court

MEMORANDUM

Facts

This matter comes before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same.

Plaintiff, a securities broker, brought an action against his former employer, R.J. Steichen and Company (R.J. Steichen), a brokerage firm, and its president/owner John E. Feltl, for defamation, breach of contract and misrepresentation, after Plaintiff had voluntarily left the employment of R.J. Steichen.

Brokers are required, under the Rules of the NASD, to have their claims decided by an NASD arbitration panel. Therefore, the case was heard by a panel of arbitrators appointed by the NASD. The NASD panel awarded Plaintiff $7312.50 together with prejudgment interest against Defendants.

Defendants allege that Plaintiff's discontent with the award is the underlying reason for his motion to vacate the decision and re-litigate his claims. Defendants contend that Plaintiff availed himself of all of the advantages of arbitration until Plaintiff received an award with which he was dissatisfied. Defendants also claim that at the end of the arbitration, all parties agreed that they had received a fair and impartial hearing on the issues. Defendants contend that because Plaintiff has received a fair hearing, this Court should confirm the NASD arbitrators' award.

Plaintiff, however, argues that the arbitration proceeding was unfair. Plaintiff contends that the arbitrators' award was procured by corruption, fraud or other undue means. In addition, Plaintiff claims that there was evident partiality and misconduct which affected the hearing. Finally, Plaintiff

claims that the NASD arbitrators exceeded their power, and thus prejudiced his rights. Plaintiff urges the court to vacate the NASD arbitrators' decision under Minn. Stat. § 572.19.

The Law

There is a strong policy in Minnesota favoring arbitration, and judicial intervention has been carefully circumscribed. Deebout v. St. Paul Fire & Marine Ins. Co., 365 N.W.2d 271, 173 (Minn. Ct. App. 1985). Minnesota encourages arbitration as a speedy, informal and relatively inexpensive procedure for resolving disputes. Ramsey County v. AFSCME Council 91 Local 8, 309 N.W.2d 785, 789 (Minn. 1981).

However, Minn. Stat. §572.19 provides that under certain circumstances, a court is required to vacate an arbitration award. Minn. Stat. §572.19 provides in pertinent part:

> Upon application of a party a court shall vacate an award where:
>
> 1. The award was procured by corruption, fraud or other undue means;
>
> 2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> 3. The arbitrators exceeded their powers; or
>
> 4. The arbitrators so conducted the hearing, contrary to the provisions of Section 572.12, as to prejudice substantially the rights of a party.

Minn. Stat. §572.19.

The Minnesota statutory section is modeled after 9 U.S.C. §10 of the Federal Arbitration Act. 9 U.S.C. §10 provides in relevant part:

> In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1. Where the award was procured by corruption, fraud or undue means;
>
> 2. Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> 3. Where the arbitrators were guilty of misconduct. . . in any misbehavior by which the rights of any party have been prejudiced; or
>
> 4. Where the arbitrators exceeded their powers.

9 U.S.C. §10. Any one of these individual findings is sufficient, in and of itself, to vacate the arbitrators' award. The standard of judicial review of arbitration procedures is whether a party to an arbitration has been denied a fundamentally fair hearing. See Baar v. Tigerman, 140 Cal. App. 3rd 979 (Cal. 1983).

The test to be applied is that of a reasonable person. More specifically, an arbitration award must be vacated upon a finding of "evident partiality" which exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Local 814 Internat'l Bd. of Teamsters v. J & B Installer & Moving, Inc., 878 F.2d 38, 40 (2nd Cir. 1989). Courts should consider the totality of the circumstances in deciding the existence of evident partiality.

U.S. v. International Broth. of Teamster, 814 F. Supp. 1165 (S.D.N.Y.).

Discussion

Plaintiff argues that the award should be vacated since Craig Landauer, an NASD official, was allowed to testify on behalf of the Defendants as an expert witness.

Defendants raise the argument that Landauer was not, in fact, an expert witness. This court disagrees. Mr. Landauer appeared voluntarily and had no direct factual information concerning this dispute, Rather, Mr. Landauer was solely offering his opinion testimony. Therefore, Mr. Landauer is considered an expert witness.

Allowing an NASD employee to testify as an expert on behalf of the Defendants in an NASD proceeding, where NASD selects the arbitrators to hear a particular dispute, presents at the very least, bias and prejudice. Plaintiff equates this to having one judge sitting in a courtroom, calling in a judge from the courtroom next door to provide some testimonial insight for the jury, while indicating that it is the defendants in the case which have called the judge to testify. The Court agrees.

Allowing an NASD official to testify on behalf of Defendants places Plaintiff at an extreme disadvantage before the arbitration panel. Clearly, admitting such testimony raises questions both as to the fairness of this proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with a NASD employee.

Furthermore, because of Plaintiff's counsel's concern regarding the activities in this arbitration proceeding, counsel contacted William R. Schief, an NASD Vice President in charge of Regional Attorneys/Enforcement. Plaintiffs counsel received an official response regarding the validity of this testimony from Schief. In that letter, Schief stated that "[t]he NASD has a longstanding policy not to provide staff persons

as so-called expert or technical witnesses in private litigation or in arbitration proceedings."

This letter makes clear that the NASD does not approve of its employees testifying in arbitration matters. In this case, the NASD overstepped their own policies and rules. The court therefore finds that allowing an NASD official to testify in the arbitration proceeding was unfair and therefore prejudiced the Plaintiff.

Plaintiff's also contend that the proceeding was corrupted by the NASD coordinator requesting a job from the securities industry panelist, James Kaiser, a former Paine-Webber manager.

The arbitration proceeding at issue concerned misrepresentation, defamation and breach of contract and thus in accordance with the NASD Rules, two persons not affiliated with the securities industry and one person designated as an affiliate of the securities industry, were chosen to decide the dispute between the parties.

Apparently, during a break in the arbitration hearing, Sharon Kranz, the Chicago NASD Case Administrator was talking to James Kaiser, the securities industry arbitrator on the panel. Kranz, a representative of the impartial sponsoring entity, was discussing with Kaiser whether Kaiser knew of any jobs for her in the securities industry.

It is the duty of the NASD Case Administrator (Kranz) to see that the hearings are conducted in an impartial manner. it therefore follows that she must be an impartial source of information owing nothing to the industry. Clearly, there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested of a panel member.

Such behavior, while not directly related to the subject matter of the arbitration at issue, does, however, lend itself to the appearance of impropriety and thus undermines the necessary impartiality required in arbitration proceedings.

For the foregoing reasons, the Court finds that the arbitration proceeding failed to allow Plaintiff a fundamentally fair hearing. The proceeding lacked the necessary impartiality required of an arbitration panel and thus prejudiced Plaintiff's rights. Therefore, the Court must grant Plaintiff's motion to vacate the arbitrators' award pursuant to Minn. Stat. §572.19 and 9 U.S.C. §10 and deny Defendants' motion to confirm same.

DFP

EXHIBIT B

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v. **ORDER**

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

On October 12, 1995, at 9:00 A.M., this Court heard the Plaintiff's Motion to Order Impartial, Non-Prejudiced Arbitrators and For Sanctions pursuant to Minnesota Statute § 572.19, et seq. and this Court's inherent powers. This Court retains jurisdiction over this matter, previously remanded by this Court to the New York NASD Office with non-Minnesota arbitrators to ensure a non-prejudiced rehearing for Mr. Honn. Rebecca E. Bender appeared as counsel to Plaintiff Brian L. Honn. Steven E. Rau appeared as counsel to Defendants R.J. Steichen and Company and John E. Feltl.

Based upon all of the pleadings and exhibits submitted by counsel to the parties and the argument of counsel at the hearing,

IT IS HEREBY ORDERED:

1. A new panel of non-Minnesota arbitrators who have not been advised by the National Association of Securities Dealers, Inc., or counsel to the parties of the previous outcome of the Honn v. Steichen arbitration, or of the fact that an NASD official, contrary to NASD policy, testified as an expert witness voluntarily on behalf of R.J. Steichen and John Feltl, shall be appointed immediately, so they are able to sit in Minnesota for the scheduled October 23-25, and November 1-3, 1995 hearing dates.

2. Should the NASD, or any of its employees or persons acting on its behalf advise any of the newly appointed arbitrators in this matter, either directly or indirectly, orally or in writing, at any time prior to the award in the rehearing of this matter, of the previous outcome of the Honn v. Steichen arbitration, or of the fact that an NASD official, contrary to NASD policy, testified voluntarily on behalf of R.J. Steichen and John Feltl, the NASD shall be sanctioned in an amount to be determined by the Court, such amount being payable to Brian Honn for the apparent inability of the NASD (for a third time) to provide Mr. Honn with a non-prejudiced and non-biased hearing, though Mr. Honn, a broker, is required by law to have his disputes handled in an NASD forum. Additional sanctions may also be ordered by this Court to compensate both parties for fees and costs incurred and/or to be incurred in rehearing this matter.

3. Should any of the parties, or counsel to any of the parties, or any employee or agent (present or former) acting for or at the direction of any of the parties or their counsel divulge during the arbitration or prior to the award in the

rehearing of the arbitration to any of the members of the arbitration panel in this matter the outcome of the previous arbitration, or the fact that an NASD official voluntarily testified as an expert witness on behalf of R.J. Steichen and John Feltl, contrary to the NASD's policy, sanctions shall be determined by the Court and be payable jointly and severally to the damaged party by the person divulging and the person or persons, parties, and/or counsel who advised or suggested to such person to make such a disclosure to the arbitrators.

IT IS SO ORDERED.

BY THE COURT:

Dated: October 13, 1995.

s/s
Delila F. Pierce
Hennepin County District Court
Judge

EXHIBIT C

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v. **ORDER**

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

On November 2, 1995, Rebecca E. Bender, counsel to Plaintiff Brian L. Honn, brought an expedited ex parte motion to stay the rehearing of an arbitration, which was previously vacated by this Court. As it appears to this Court, that similar issues to those which required the vacatur previously are now present again, this Court is hereby ordering that the rehearing of the arbitration be and hereby is stayed pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and nonprejudiced hearing.

IT IS SO ORDERED.

Dated: November 2, 1995. s/Delila F. Pierce
Judge
Hennepin County District Court

EXHIBIT D

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff,

v. **ORDER AND MEMORANDUM**
FILE NO. CT 94-015904

R. J. Steichen & Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 21st day of November, 1995, on Plaintiff's motions for sanctions and to strike untimely filings.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings, and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Plaintiff's motion for sanctions is denied.
2. Plaintiff's motion to strike untimely filings is denied.
2. The attached Memorandum is incorporated herein and made a part of this order.

BY THE COURT:

Dated: January 23, 1996.

s/s
Delila F. Pierce
Judge of District Court

MEMORANDUM

This matter comes before the Court on Plaintiff's motions for sanctions and to strike untimely filings.

I.

Facts

This matter originally came before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same. The Court vacated the arbitration award, finding that when Craig Landauer, an NASD official, testified on behalf of Defendants as an expert witness in an NASD proceeding where the NASD selects the arbitrators to hear a particular dispute, there was "at the very least, bias and prejudice" to Plaintiff. The Court remanded the case to the NASD's New York City Arbitration Office and ordered that non-Minnesota arbitrators be appointed to decide the case upon rehearing.

Prior to rehearing, Defendants, through their counsel, filed a motion for postponement with the NASD New York Office. This motion made reference to the amount of the arbitration award obtained in the original, biased proceeding. Plaintiff attempted to stop this information from getting to the newly-appointed panel, but his efforts were unsuccessful. Plaintiff then sought relief in this Court. The Court ordered that the new panel be removed and advised the parties, their counsel, and the NASD that if anyone mentioned the amount of the previous award or the fact that an NASD official testified on behalf of Defendants at the previous hearing, the Court would impose sanctions. A new panel of non-

Minnesota arbitrators was appointed, and rehearing was scheduled for later the same month.

Before the matter could be heard by the new panel, Plaintiff was again before the Court, seeking to stay the rehearing of the arbitration. Defendants had retained Richard Rush, the former Assistant Director of District IV of the NASD, as their new expert witness. Defendant R.J. Steichen is located in District IV. During the time when the wrongful acts alleged by Plaintiff were taking place, Rush was the number two person, responsible for regulation and discipline of R.J. Steichen. Despite Rush's recent and direct involvement with Steichen, the NASD indicated that it would not prohibit Rush from testifying on behalf of Defendant Steichen. The Court granted Plaintiff's expedited *ex parte* motion to stay the rehearing of the arbitration as it appeared to the Court that similar issues to those which required the vacatur previously were again present.

Plaintiff then brought a motion for sanctions against Defendants and their counsel pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21 subd. 2 (1988 & Supp. 1995), and this Court's Order of October 13, 1995. Plaintiff claims that in retaining Rush as their new expert witness and by refusing to withdraw his name after Plaintiff objected, Defendants and their counsel acted in bad faith, needlessly increasing the cost of litigation. Plaintiff seeks sanctions and attorney fees in the amount of $200,000. Defendants contend that the Court does not have jurisdiction over the arbitration process and that Plaintiff had not shown bad faith on the part of Defendants or their counsel.

II.

Motion for Sanctions

Plaintiff has requested that the Court award them sanctions and attorney fees pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21 subd. 2 (1988 & Supp. 1995), and this Court's October 13, 1995 Order. Defendants maintain that the Court does not have jurisdiction over this matter and that Plaintiff has failed to prove that Defendants and their counsel acted in bad faith.

With regard to the Court's jurisdiction in this case, the law is quite clear that the Court does not have the authority to decide the merits of Plaintiff's claims once they have been properly submitted to arbitration. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) ("[A]rbitration procedure, when selected by the parties to a contract, [must] be speedy and not subject to delay and obstruction in the courts."). The trial court may not step into a case submitted to arbitration and tell the arbitrator what to do and when to do it. Titan/Value Equities Group, Inc. v. Superior Court, 29 Cal. App. 4th 482, 488, 35 Cal. Rptr. 2d 4, 7 (Cal. Ct. App. 1994). However, once the court's general equity jurisdiction has been invoked, it may stay an arbitration proceeding on the ground of bias or prejudice. To permit arbitration to proceed under such circumstances would be futile since the award would almost certainly be vacated. Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (1989). See generally 4 Am. Jur. 2d, Alternative Dispute Resolution §165 (1995).

This Court has not been asked to decide the merits of Plaintiff's employment and defamation claims against Defendants. The Court has been asked to stay an arbitration proceeding in a forum which has previously been found, by this Court, to be prejudicial to him and which, in all likelihood, based upon the facts presented to the Court, will be again.

The Court was acting within its authority when it granted Plaintiff's motion to stay the rehearing of arbitration, and the Court has the authority to award sanctions in this case if appropriate.

Plaintiff asks the Court to award sanctions and attorney fees pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21 subd. 2 (1988 & Supp. 1995), and this Court's October 13, 1995 Order. The Minnesota Supreme Court has noted that only minor and insignificant differences exist between Minnesota Rule 11 and Federal Rule 11, and, therefore, cases interpreting the federal rule are valuable guidelines in understanding the purpose and application of the state rule. Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990). Rule 11 places an affirmative duty on attorneys when signing documents to make reasonable inquiry into the factual and legal bases of claims and to determine whether they are grounded in fact and not made for an improper purpose, such as harassment, delay, or increased cost. Minn. R. Civ. P. 11; Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990). By its terms, Rule 11 applies to "pleadings, motions, or other papers;" conduct *per se* is not subject to Rule 11. Minn. R. Civ. P. 11; Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490, 496 (3rd Cir. 1989) (Rule 11 sanctions are proper only in situations involving a signed pleading); Simpson v. Welch, 900 F. 2d 33, 36 (4th Cir. 1990) ("The rule does not purport to be a means for district courts to sanction conduct in the course of a lawsuit . . . that does not involve the signing of pleadings, motions, or other papers.").

Papers filed in the course of an arbitration proceeding are not subject to Rule 11. Rule 11 does apply to any papers in cases filed in district courts that are related to arbitration proceedings. Thus, actions to compel arbitration, to stay arbitration, to enforce or challenge an arbitration award are subject to Rule 11. Sheet Metal Workers, Local 162 v. Jason

Mfrg., 900 F.2d 1392 (9th Cir. 1990). However, the rule does not apply to papers filed in the underlying arbitration itself. Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66 (3rd Cir.), cert. denied, 488 U.S. 848 (1988) ("Rule 11 was designed to penalize abuse of district court process, not an improper submission to arbitration.")

Under Minn. Stat. §549.21, costs, disbursements, and reasonable attorney fees may be awarded against a party who acted in bad faith, asserted a claim or defense that is frivolous and costly to the other party, asserted an unfounded position solely to delay the ordinary course of proceedings or to harass, or committed a fraud upon the court. Minn. Stat. §549.21, subd. 2 (1988 & Supp. 1995). Requisite to an award of sanctions under the statute is a finding that counsel proceeded in bad faith. Uselman, 464 N.W.2d at 140. The existence of bad faith is an issue of fact to be determined by the trial court. Id.

Under both the rule and the statute, an attorney must have fair notice of both the possibility of a sanction and the reason for its proposed imposition. Uselman, 464 N.W.2d at 143. In addition, the attorney must be given the opportunity to respond to the notice of a possible sanction. Id. at 144. See also Martin v. Brown, 63 F.3d 1252 (3rd Cir. 1995) ("The fundamental requirements of due process--notice and opportunity to respond--must be afforded before any sanction is imposed; with regard to sanctions, particularized notice of the grounds for the sanction under consideration is generally required.").

The Court does not believe that an award of sanctions is appropriate in this case. Plaintiff failed to point to any "pleading, motion, or other paper" filed in violation of Rule 11 or the statute. The only papers to which Plaintiff refers are papers filed in the underlying arbitration, and this Court is without authority to sanction Defendants and their counsel for an improper submission to arbitration. Moreover, Plaintiff has

failed to convince the Court that Defendants and their counsel proceeded in bad faith in retaining Rush as their expert witness and in refusing to withdraw his name after Plaintiff objected.

As to this Court's October 13, 1995 Order, the language of the Court's order is specific in its prohibition: neither the specific award received nor the reasons for the Court's vacatur were to be disclosed to the new panel of arbitrators. Defendants and their counsel did not violate this order. Therefore, Plaintiff's motion for sanctions must be denied.

Based on the Court's decision herein, it does not need to determine the issue of whether Defendants and their counsel had adequate notice of the possibility of sanctions and an opportunity to respond as required by Uselman, 464 N.W.2d at 143, 144 and Martin v. Brown, 63 F.3d 1252 (3rd Cir. 1995).

III.

Motion to Strike Untimely Filings

Under Rule 115 of the General Rules of Practice for District Courts, Plaintiff's motion for sanctions and attorney fees was a non-dispositive motion. With regard to non-dispositive motions, Rule 115 clearly sets forth the time lines for filing and serving motion papers and response memoranda. If responsive papers are not properly served and filed in a non-dispositive motion, the court may deem the motion unopposed and grant the relief requested without a hearing. However, the court may, in its discretion, waive or modify the time limits established by the rule.

Plaintiff's attorney was given additional time to respond to Defendants' late filings, and, therefore, Plaintiff suffered no prejudice as a result of Defendants' delay. Plaintiff's motion to strike untimely filings is denied.

DFP

EXHIBIT E

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff,

v. **ORDER AND MEMORANDUM**
FILE NO. CT 94-15904

R. J. Steichen & Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 29th day of January, 1995, on Defendant's motion to compel arbitration and for sanctions.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings, and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Defendant's motion to compel arbitration is granted. This matter should be submitted to arbitration immediately.

2. Defendant's motion for sanctions is denied.

3. The attached Memorandum is incorporated herein and made part of this order.

BY THE COURT:

Dated: April 11, 1996.

s/s
Delila F. Pierce
Judge of District Court

MEMORANDUM

This matter comes before the Court on Defendant's motion to compel arbitration and for sanctions.

I.

Facts

This matter originally came before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. ("NASD") arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same. The Court vacated the arbitration award, finding that when Craig Landauer, an NASD official, testified on behalf of Defendants as an expert witness in an NASD proceeding where the NASD selects the arbitrators to hear a particular dispute, there was "at the very least, bias and prejudice" to Plaintiff. The Court remanded the case to the NASD's New York City Arbitration Office and ordered that non-Minnesota arbitrators be appointed to decide the case upon rehearing.

Prior to rehearing, Defendants, through their counsel, filed a motion for postponement with the NASD New York Office. This motion made reference to the amount of the arbitration award obtained in the original, biased proceeding. Plaintiff attempted to stop this information from getting to the newly-appointed panel, but his efforts were unsuccessful. Plaintiff then sought relief in this Court. The Court ordered that the new panel be removed and advised the parties, their counsel, and the NASD that if anyone mentioned the amount of the previous award or the fact that an NASD official testified on behalf of Defendants at the previous hearing, the Court would impose sanctions. A new panel of non-

Minnesota arbitrators was appointed, and rehearing was scheduled for later the same month.

Before the matter could be heard by the new panel, Plaintiff was again before the Court, seeking to stay the rehearing of the arbitration. Defendants had retained Richard Rush, the former Assistant Director of District IV of the NASD, as their new expert witness. Defendant R.J. Steichen is located in District IV. During the time when the wrongful acts alleged by Plaintiff were taking place, Rush was the number two person, responsible for regulation and discipline of R.J. Steichen. Despite Rush's recent and direct involvement with Steichen, the NASD indicated that it would not prohibit Rush from testifying on behalf of Defendant Steichen. The Court granted Plaintiff's expedited *ex parte* motion to stay the rehearing of the arbitration as it appeared to the Court that similar issues to those which required the vacatur previously were again present.

Plaintiff then brought a motion for sanctions against Defendants and their counsel pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21, subd. 2, and this Court's Order of October 13, 1995. Plaintiff claimed that in retaining Rush as their new expert witness and by refusing to withdraw his name after Plaintiff objected, Defendants and their counsel acted in bad faith, needlessly increasing the cost of litigation. The Court denied Plaintiff's motion.

Defendants now bring this motion to compel arbitration and for sanctions. Defendants argue that Plaintiff's objection to Rush's testimony is not an appropriate issue for this Court and cannot provide a valid basis for delaying the rearbitration of this matter. Further, Defendants contend that Plaintiff and Plaintiff*s* counsel have unreasonably and unnecessarily delayed the rearbitration of this matter. Defendants seek an award of attorney fees pursuant to Rule 11 of the Minnesota Rules of Civil Procedure and Minn. Stat. §549.21, subd. 2.

After Defendants filed their motion, on February 15, 1996, Rush withdrew as an expert witness in this matter for personal reasons wholly unrelated to this case.

II.

Motion to Compel Arbitration

With the withdrawal of Mr. Rush as an expert witness on February 15, 1996, the Court no longer has grounds for continuing its stay of the rearbitration of this matter. Defendants' motion to compel arbitration must be granted. Amdahl v. Green Giant Co., 497 N.W.2d 319, 322 (Minn. Ct. App. 1993).

III.

Motion for Sanctions

Defendants seek sanctions pursuant to Rule 11 of the Minnesota Rules of Civil Procedure and Minn. Stat. §549.21, subd. 2. Defendants contend that Plaintiff and Plaintiff's counsel have unreasonably and unnecessarily delayed the rearbitration of this matter. The Court does not believe that an award of sanctions is appropriate in this case. Defendants have failed to convince the Court that Plaintiff and his counsel proceeded in bad faith in bringing matters before this Court.

DFP

EXHIBIT F

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff,

v.

R. J. Steichen & Company and John E. Feltl,

Defendants.

AMENDED ORDER DUE TO CLERICAL ERROR IN THE DATE OF HEARING

FILE NO. CT 94-15904

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 29th day of January, 1996, on Defendant's motion to compel arbitration and for sanctions.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings, and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Defendant's motion to compel arbitration is granted. This matter should be submitted to arbitration immediately.

2. Defendant's motion for sanctions is denied.

3. The attached Memorandum is incorporated herein and made part of this order.

BY THE COURT:

Dated: April 16, 1996.

s/s
Delila F. Pierce
Judge of District Court

MEMORANDUM

This matter comes before the Court on Defendant's motion to compel arbitration and for sanctions.

I.

Facts

This matter originally came before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. ("NASD") arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same. The Court vacated the arbitration award, finding that when Craig Landauer, an NASD official, testified on behalf of Defendants as an expert witness in an NASD proceeding where the NASD selects the arbitrators to hear a particular dispute, there was "at the very least, bias and prejudice" to Plaintiff. The Court remanded the case to the NASD's New York City Arbitration Office and ordered that non-Minnesota arbitrators be appointed to decide the case upon rehearing.

Prior to rehearing, Defendants, through their counsel, filed a motion for postponement with the NASD New York Office. This motion made reference to the amount of the arbitration award obtained in the original, biased proceeding. Plaintiff attempted to stop this information from getting to the newly-appointed panel, but his efforts were unsuccessful. Plaintiff then sought relief in this Court. The Court ordered that the new panel be removed and advised the parties, their counsel, and the NASD that if anyone mentioned the amount of the previous award or the fact that an NASD official testified on behalf of Defendants at the previous hearing, the Court would impose sanctions. A new panel of non-

Minnesota arbitrators was appointed, and rehearing was scheduled for later the same month.

Before the matter could be heard by the new panel, Plaintiff was again before the Court, seeking to stay the rehearing of the arbitration. Defendants had retained Richard Rush, the former Assistant Director of District IV of the NASD, as their new expert witness. Defendant R.J. Steichen is located in District IV. During the time when the wrongful acts alleged by Plaintiff were taking place, Rush was the number two person, responsible for regulation and discipline of R.J. Steichen. Despite Rush's recent and direct involvement with Steichen, the NASD indicated that it would not prohibit Rush from testifying on behalf of Defendant Steichen. The Court granted Plaintiff's expedited *ex parte* motion to stay the rehearing of the arbitration as it appeared to the Court that similar issues to those which required the vacatur previously were again present.

Plaintiff then brought a motion for sanctions against Defendants and their counsel pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21, subd. 2, and this Court's Order of October 13, 1995. Plaintiff claimed that in retaining Rush as their new expert witness and by refusing to withdraw his name after Plaintiff objected, Defendants and their counsel acted in bad faith, needlessly increasing the cost of litigation. The Court denied Plaintiff's motion.

Defendants now bring this motion to compel arbitration and for sanctions. Defendants argue that Plaintiff's objection to Rush's testimony is not an appropriate issue for this Court and cannot provide a valid basis for delaying the rearbitration of this matter. Further, Defendants contend that Plaintiff and Plaintiff's counsel have unreasonably and unnecessarily delayed the rearbitration of this matter. Defendants seek an award of attorney fees pursuant to Rule 11 of the Minnesota Rules of Civil Procedure and Minn. Stat. §549.21, subd. 2.

After Defendants filed their motion, on February 15, 1996, Rush withdrew as an expert witness in this matter for personal reasons wholly unrelated to this case.

II.

Motion to Compel Arbitration

With the withdrawal of Mr. Rush as an expert witness on February 15, 1996, the Court no longer has grounds for continuing its stay of the rearbitration of this matter. Defendants' motion to compel arbitration must be granted. Amdahl v. Green Giant Co., 497 N.W.2d 319, 322 (Minn. Ct. App. 1993).

III.

Motion for Sanctions

Defendants seek sanctions pursuant to Rule 11 of the Minnesota Rules of Civil Procedure and Minn. Stat. §549.21, subd. 2. Defendants contend that Plaintiff and Plaintiff's counsel have unreasonably and unnecessarily delayed the rearbitration of this matter. The Court does not believe that an award of sanctions is appropriate in this case. Defendants have failed to convince the Court that Plaintiff and his counsel proceeded in bad faith in bringing matters before this Court.

DFP

EXHIBIT G

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v.

AFFIDAVIT OF
REBECCA E. BENDER

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Rebecca E. Bender, counsel to Plaintiff Brian L. Honn in the above-captioned action has attached a copy of the United States District Court Complaint which was filed today in the United States District Court for the District of Minnesota.

FURTHER YOUR AFFIANT SAITH NOT.

/s/
Rebecca E. Bender

Subscribed and sworn to before
me this 28th day of February, 1996.

/s/_____
Notary Public

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Brian L. Honn, Court File No.

Plaintiff,

v. **COMPLAINT**

National Association of Securities Dealers, Inc. and Securities and Exchange Commission, **JURY TRIAL DEMANDED**

Defendants.

PARTIES

1. Plaintiff Brian L. Honn is a citizen and resident of Eden Prairie, Minnesota in Hennepin County, Minnesota. Mr. Honn is a securities broker who was formerly employed by the brokerage firm of R.J. Steichen & Company. R.J. Steichen & Company ("Steichen") is a dues paying broker/dealer licensed by the National Association of Securities Dealers, Inc. ("NASD") and subject to the oversight of the NASD and the Securities and Exchange Commission (the "Commission").

2. The NASD is a Delaware corporation registered with the commission as a national securities association, pursuant to the Maloney Act, 52 Stat. 1070 (1938), 15 U.S.C. § 78o-3, et seq. amending the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78a, et seq. The NASD is a federal, self-regulatory organization ("SRO").

3. The United States Securities and Exchange Commission ("Commission") is a governmental agency, with principal offices in Washington, D.C., which is empowered, pursuant to Section 15 of the Securities Exchange Act of 1934, to provide for the regulation of broker-dealer transactions and the registration of brokers and the securities in which they trade. The Securities and Exchange commission also approves and reviews the NASD arbitration rules under Section 19 of the Securities Exchange Act. 15 U.S.C. 78s(d) (1) and 17 C.F.R. § 240.19b-4.

JURISDICTION OF THIS COURT

4. This action is brought pursuant to the Fifth Amendment to the Constitution of the United States, pursuant to 15 U.S.C. §§ 1 and 2, and pursuant to various state and common law theories as set forth herein.

5. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332 and under the doctrine of pendent jurisdiction.

UNDERLYING FACTS REGARDING REGULATORY SCHEME

6. In order for a broker such as Plaintiff Brian Honn to gain employment in the securities industry, he is required to sign a Form U-4 registration agreement upon entering the securities business. This form provides, in relevant part, that any and all disputes which Mr. Honn, an individual securities broker, has with his brokerage firm employer must be arbitrated before a panel appointed by the NASD in an NASD arbitration forum, pursuant to the NASD Code of Arbitration Procedure. In other words, securities brokers like Brian Honn may not proceed through the court system or through any

non-NASD arbitration forum to have their disputes with former employers heard.

7. The Securities Exchange Act of 1934 provides for a system of federal regulation of the securities industry. The Maloney Act established guidelines for the formation and oversight by the Commission of self-regulatory organizations such as the NASD. The United States Congress delegated power to the NASD and the registered stock exchanges to enforce "compliance by members of the industry with both the legal requirements laid down in the Exchange Act and the ethical standards going beyond those requirements." This privilege of self-regulation was actively sought by securities brokerage firms.

8. Congress granted the Commission broad supervisory responsibilities over the NASD. As an example, the NASD's bylaws and rules must conform to the Exchange Act, 15 U.S.C. § 78o-3(b). In addition, the NASD is also subject to extensive oversight, supervision and control by the Commission on an ongoing basis. 15 U.S.C. § 78s(a)(3)(B). The Commission approves the NASD's rules, policies, practices and interpretations prior to their implementation. 15 U.S.C. § 78s.

9. The NASD's rules may not impose any burden on competition not necessary or appropriate to further the purposes of the Exchange Act. 15 U.S. C. § 78o-3 (b)(9). Consistent with the requirements of the Exchange Act, the commission may abrogate or add to these rules.

10. Every self-regulatory organization, including the NASD, must comply with the provisions of the Exchange Act, its own rules and the rules of the Commission. 15 U.S.C. § 78s(g)(1). Pursuant to 15 U.S.C. § 78s(h), the NASD must enforce compliance with these rules by their members and persons associated with their members.

11. Only broker/dealers or brokerage firms such as Mr. Honn's former employer J.R. Steichen & Company are dues

paying members of the NASD. Brian Honn, like any individual broker, is considered a "person associated with a member." He is not and cannot be a member of the NASD and does not pay dues to the NASD.

12. The Commission has the power to suspend or revoke the registration of any self-regulatory organization such as the NASD or to censure or restrict its activities, functions and operations, or those of NASD member firms or of any person associated with a member. Pursuant to 15 U.S.C. § 78s(g)(2), the Commission may remove from office or censure any officer or director of a self-regulatory organization if it finds he or she has willfully violated the rules or abused his or her position. The commission may also bring actions to enjoin any activity by the NASD that violates the Exchange Act or rules promulgated thereunder. 15 U.S. C. § 78u(d).

UNDERLYING FACTS REGARDING PROBLEMS IN THE FIRST HONN ARBITRATION IN THIS CASE

13. On June 16, 1993, Plaintiff Brian L. Honn, a securities broker formerly with NASD licensed member R.J. Steichen & Company filed a Statement of Claim with the NASD Arbitration Office in New York, New York, captioned Brian L. Honn v. R.J. Steichen & Company and John E. Feltl, NASD Case No. 93-02443 (Mr. Feltl was the president/owner of R.J. Steichen & Company during the relevant time period). The claims raised by Mr. Honn after he voluntarily left Steichen, included claims for defamation due to inappropriate and inaccurate information placed by Steichen on Mr. Honn's Form U-5, breach of contract and misrepresentation.

14. Attorneys' fees, costs and expenses incurred by Brian Honn in bringing his dispute with his former brokerage firm Steichen through arbitration, included attorneys' fees in the amount of approximately $26,000.00, costs and expenses in the amount of approximately $2,300.00 and expert witness

fees and expenses in the amount of approximately $11,300.00. Mr. Honn's hard costs and expenses in proceeding with the first arbitration totaled approximately $42,000.00. Honn retained three expert witnesses in his arbitration who dealt generally with (1) public availability of information disclosed by broker/dealers concerning brokers on Form U-5's; (2) regulatory requirements for disclosure on Form U-5's; and (3) an economist's calculation of the present value of Mr. Honn's damages due to the improper Form U-5 filed by Steichen.

15. Following the arbitration between Plaintiff Brian Honn and his former employer, brokerage firm Steichen, Honn brought a Motion to Vacate the Arbitrators' Award for two primary reasons. First, an acting NASD official testified voluntarily at the NASD hearing as an expert witness for broker/dealer Steichen, though this was admittedly contrary to NASD policy, and second, the NASD staff attorney assigned to the case asked the securities industry panelist on the three person panel deciding the Honn v. Steichen case regarding job opportunities for her in the securities industry.

16. On January 20, 1995, The Honorable Judge Pierce of the Minnesota District Court granted Mr. Honn's Motion to Vacate (Exhibit A hereto).

17. With respect to the issue of an NASD official testifying voluntarily as an expert for Steichen, an NASD dues paying member, Minnesota District Court Judge Pierce held, inter alia:

> Allowing an NASD employee to testify as an expert on behalf of the Defendants in an NASD proceeding, where the NASD selects the arbitrators to hear a particular dispute, presents at the very least, bias and prejudice. Plaintiff equates this to having one judge sitting in a courtroom, calling in a judge from the courtroom next door to provide some testimonial insight for the jury, while indicating that it is the

defendants in the case which have called the judge to testify. The Court agrees.

Allowing an NASD official to testify on behalf of Defendants places Plaintiff (Honn) at an extreme disadvantage before the arbitration panel. Clearly, admitting such testimony raises questions both as to the fairness of the proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with an NASD employee.

Furthermore, because of Plaintiff's counsel's concern regarding the activities in this arbitration proceeding, counsel contacted William R. Schief, an NASD Vice President in charge of Regional Attorney/ Enforcement. Plaintiff's counsel received an official response regarding the validity of this testimony from Schief. In that letter Schief stated that 'the NASD has a long standing policy not to provide staff persons as so called expert or technical witnesses in private litigation or in arbitration proceedings.' (Exhibit B hereto.)

This letter makes clear that the NASD does not approve of its employees testifying in arbitration matters. In this case the NASD overstepped their own policies and rules. The Court therefore finds that allowing an NASD official to testify in the arbitration proceeding was unfair and therefore prejudiced the Plaintiff.

18. With respect to the issue of Sharon Kranz, the Chicago NASD Arbitration office Case Administrator for the Honn v. Steichen case, requesting information about a job for

herself from the securities industry panelist, District Court Judge Pierce stated:

> The arbitration proceeding at issue concerns misrepresentation, defamation and breach of contract and thus in accordance with the NASD rules, two persons not affiliated with the securities industry and one person designated as an affiliate of the securities industry were chosen to decide the dispute between the parties.
>
> Apparently, during a break in the arbitration hearing, Sharon Kranz, the Chicago NASD Case Administrator was talking to James Kaiser, the securities industry arbitrator on the panel. Kranz, a representative of the impartial sponsoring entity, was discussing with Kaiser whether Kaiser knew of any jobs for her in the securities industry.
>
> It is the duty of the NASD Case Administrator (Kranz) to see that the hearings are conducted in an impartial manner. It therefore follows that she must be an impartial source of information owing nothing to the industry. Clearly, there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested of a panel member.
>
> Such behavior while not directly related to the subject matter of the arbitration at issue, does, however, lend itself to the appearance of impropriety and thus undermines the necessary impartiality required in arbitration proceedings.

19. The Minnesota District Court held, through its decision, that though brokers are required under the NASD rules to have their claims decided by an NASD arbitration panel, this agreement to arbitrate does not limit the reach of Minn. Stat. § 572.19, which provides that a court "shall vacate an award" when one of several problems occurred. In the first hearing of the Honn case, at a minimum:

1. The award was procured by corruption or other undue means (Minn. Stat. § 572.19(1));
2. There was partiality by the National Association of Securities Dealers, Inc. ("NASD") and by the NASD arbitrators and/or misconduct prejudicing the rights of Mr. Honn (Minn. Stat. § 572.19(2)); and
3. The NASD arbitrators and the NASD conducted the hearing in a manner which substantially prejudiced the rights or claimant Brian Honn (Minn. Stat. § 572.19(4)).

20. The Minnesota District Court also held that the case was remanded to the New York City Arbitration Office of the NASD, Attention: Deborah Masucci, Director of Arbitration and that non-Minnesota arbitrators were to be appointed to decide this matter upon rehearing.

21. Attorneys' fees, costs and expenses incurred by Mr. Honn in bringing the Motion to Vacate amounted to approximately $4,800.00.

22. This Motion to Vacate due to the unfair and prejudiced NASD hearing was appealed by Steven Rau, counsel to the Steichen Defendants, twice to the Minnesota Court of Appeals, once to the Minnesota Supreme Court and once, pursuant to a Petition for Writ Certiorari to the United States Supreme Court.

23. Plaintiff Brian Honn is a struggling broker due to the defamation which is the primary claim he has been attempting to bring in an unprejudiced forum against his former employer, the brokerage firm R.J. Steichen & Company and John Feltl, its principal. Mr. Honn's expenses and legal fees in responding to the numerous appeals by opposing counsel of his successful motion to vacate have amounted to approximately $18,000.00, including over $5,400.00 solely in printing costs to oppose the Steichen Defendants' Petition for Writ of Certiorari to the United States Supreme Court.

UNDERLYING FACTS REGARDING PROBLEMS IN THE SECOND SCHEDULED REARBITRATION IN THIS CASE

24. Mr. Honn was anxious to proceed with a non-prejudiced second hearing in this matter. Mr. Honn, through his counsel, sent numerous letters, some via certified mail and Federal Express, to Deborah Masucci, NASD Director of Arbitration, to ensure that this matter was set for a second hearing promptly and to attempt to avoid any other "NASD conflict" issues in the future in the Honn matter (Exhibit C hereto). The first letter was sent on November 18, 1994, prior to Mr. Honn's motion to vacate being filed. The last letter to the NASD's Masucci was sent on March 29, 1995. The NASD's Masucci failed to respond to any of Mr. Honn's letters, despite the fact that Mr. Honn was being required to proceed through a second hearing due to the NASD's improper actions.

25. Mr. Honn was eventually apprised by John Barlow, head of the NASD Chicago Arbitration Office, that the Honn file had been erroneously sent back to his office in Chicago, despite the fact that Deborah Masucci, the Director of NASD Arbitration, had been advised by Honn's counsel repeatedly

that this matter was to be specifically handled by Deborah Masucci out of the NASD's New York office.

26. The file was eventually moved back to New York in the late spring of 1995, where it had been ordered to be sent as of January 1995. After many additional phone calls and letters, the case was set for rehearing in early October 1995.

27. Steichen Defendant's counsel, Rau, moved to postpone the rehearing of the case in mid-September 1995, stating that it would not be appropriate for the matter to proceed as scheduled prior to the parties being apprised as to the decision of the United States Supreme Court with respect to Steichen's Petition for Writ of certiorari. Included within Mr. Rau's motion on behalf of his client, brokerage firm Steichen, was the outcome of the previous award to Mr. Honn, which was a minimal dollar amount. Mr. Rau did not mention in his papers that the previous decision was the result of a prejudiced hearing.

28. Bender apprised the NASD's Valerie Bailey through phone conversations and in writing (Exhibit D) of the fact that Ms. Bailey should not provide the newly appointed panel with copies of the motion papers indicating the outcome of the previous award from the prejudiced hearing, as this would serve to taint the panel. The NASD made the determination to provide Mr. Rau's motion containing information regarding the previous award to the panel. Counsel to Honn, challenged the panel for cause when the NASD provided this prejudicial material to the newly appointed panel. Deborah Masucci's "boss" Jim O'Donnell admitted that the NASD actions in this regard were improper.

29. The NASD denied Mr. Honn's challenge for cause, requiring Honn to go back to District Court Judge Pierce who had retained jurisdiction over the matter. Judge Pierce entered an order removing the tainted arbitrators for cause, ordering the appointment of a new panel and advising the NASD, the Steichen Defendants and their counsel, that any mention of the

amount of the previous award or of the fact that an NASD official testified on behalf of the Steichen Defendants to any newly appointed panel would result in sanctions being imposed by the Court (Exhibit D hereto).

30. Mr. Honn incurred an additional $5,800.00 in expenses and attorneys' fees due to the NASD scheduling discussions, having to go into court to get the second panel removed, etc.

UNDERLYING FACTS REGARDING PROBLEMS IN THE THIRD SCHEDULED REARBITRATION IN THIS CASE

31. During the end of the time period when Plaintiff Honn was pressing for the hearing to proceed promptly and Steichen's counsel continued filing appeals, Steichen's counsel, Rau, advised Claimant's counsel that he intended to call Richard Rush as an expert witness at the second hearing of the Honn v. Steichen case.

32. Richard Rush was the former Assistant District Director of the NASD Kansas City office. Mr. Rush left the NASD in approximately May of 1995, less than six months before the second hearing of this matter was to proceed. Mr. Rush was the number two person, second only to the District Director, who had disciplinary authority over the Honn v. Steichen Defendants R.J. Steichen & Company and its principals, including Defendant John Feltl (Exhibit E hereto). District No. 4 of the NASD includes a number of states, one of which is the State of Minnesota, where Steichen has its offices.

33. On or about October 16, 1995, Honn's counsel served a Subpoena upon the NASD requesting certain documents, including documents relating to Richard Rush and his connection with Steichen during the time period when the alleged defamation against Mr. Honn began, due to Steichen

filing the U-5 containing inaccurate information (Exhibit F hereto). Honn believed that once the NASD was aware of the fact that a former NASD official with direct disciplinary responsibility for a member firm was going to be testifying as an expert on behalf of that member firm concerning activities over which that official had control at the time, the NASD would prohibit that individual from testifying.

34. On November 2, 1995, Thomas P. Moran, an attorney in the General Counsel's Office of the NASD, sent a letter via telefax to Valerie Bailey, the staff attorney for the NASD assigned to the Honn v. Steichen rehearing, indicating that as former NASD employees may testify in the upcoming arbitration, the NASD wished that it "be made clear to the arbitrators that these ex-employees are testifying in their personal capacities, not on behalf of the NASD and do so without the approval or disapproval of the Association." (Underlining supplied) (Exhibit G hereto).

35. On that same day, Honn brought a Motion to Stay the Arbitration Proceedings scheduled to take place the following day before the Minnesota District Court. Honn argued that though Rush had direct disciplinary oversight over Steichen less than six months before, and though his "NASD cloak" was still warm, he was going to be testifying for the Steichen Defendants. Honn explained to the Court that it made no matter what Mr. Rush would say, the logical impression left with the arbitrators would be that Mr. Rush, a recently retired NASD official, found nothing wrong with Steichen's conduct during the time he was charged with overseeing Steichen's compliance with NASD rules and regulations. Otherwise, Mr. Rush would not be testifying on behalf of Steichen.

36. Honn explained to the Court that Mr. Rush was not just an expert witness. Rather, he would be a combined fact and expert witness. Mr. Rush, with the assistance of the

NASD, was going to use the NASD's name to again help a member, fee paying firm, R.J. Steichen & Company.

37. Though the NASD provided some documents relating to other issues responsive to Mr. Honn's Subpoena, the NASD refused to provide documents which would demonstrate Mr. Rush's close connection to Steichen, while he was supervising the firm (Exhibit H hereto.) Mr. Honn advised the Court that the NASD was thereby assisting Mr. Rush and its fee paying member, R.J. Steichen & Company, by using its privilege as a sword and a shield. Mr. Rush, the recently retired NASD Assistant Director, would have been allowed, with his sword, to testify against Mr. Honn's claims of defamation. The NASD would then hold up its shield to protect Mr. Rush, itself and its fee paying member R.J. Steichen & Company, by refusing to produce documents showing the wrongdoing which had taken place at Steichen during the time period Mr. Rush, on behalf of the NASD, was regulating the firm. Mr. Rush's testimony would be akin to "blessing" Steichen and all of its activities as soon as he took the stand.

38. The NASD's Thomas Moran advised the NASD staff attorney assigned to this matter, Valerie Bailey, to bring up the issues involving the subpoena with the panel. However, as soon as the NASD-appointed arbitrators sitting in an NASD forum would be advised of the fact that the NASD was refusing to produce documents requested by Mr. Honn or the fact that an NASD official who had direct oversight responsibilities over Steichen six months before the hearing was testifying for that firm, there would again be a prejudiced hearing for Mr. Honn.

39. Mr. Honn's ex parte request for stay of the arbitration proceeding was granted by Judge Pierce. Honn, through counsel, advised the Court that he intended to sue the NASD, due to his inability to have his claims heard in a non-prejudiced forum. Judge Pierce held in her November 2, 1995 Order:

> On November 2, 1995, Rebecca E. Bender, counsel to Plaintiff Brian L. Honn brought an expedited ex parte motion to stay the rehearing of an arbitration which was previously vacated by this Court. As it appears to this Court that similar issues to those which required the vacatur previously are now present again, this Court is hereby ordering that the rehearing of the arbitration be and hereby is stayed pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and non-prejudiced hearing. It is so ordered.

(Underlining supplied) (Exhibit I hereto).

40. Brian Honn incurred an additional $12,200.00 in legal fees and expenses between the time the second panel was removed by the Court and the time the third panel's hearing of this case was stayed, as he was required to again go into Court for relief, while his experts and attorney were required to continue preparing for his case. These expenses included having the previous taped hearing transcribed by a court reporter.

41. Mr. Honn sought sanctions against Steichen, Feltl and their counsel for their involvement in the above-referenced actions in the Honn v. Steichen arbitration matter. On January 23, 1996, the District Court denied Honn's motion, primarily due to the fact that the Court believed it lacked jurisdiction to sanction Steichen, Feltl and Attorney Rau for their actions in matters relating to the NASD proceeding as Steichen had not directly violated a District Court order (Exhibit J hereto). The Court also held:

> . . . once the court's general equity jurisdiction has been invoked, it may stay an arbitration proceeding on the ground of bias or prejudice. To permit arbitration to proceed under such circumstances would be futile since the award would almost certainly be vacated . . . .

42. Mr. Honn incurred an additional $4,500.00 in legal fees and expenses in bringing his Motion for Sanctions against Steichen.

43. Brian Honn, who is presently borrowing money to make his mortgage payment, and is paying interest on these borrowed funds, does not have the finances to go through a prejudiced hearing and the subsequent appeals again. With the "law of this case," the policies of the NASD as approved by the Commission, and the knowledge by Steichen's counsel of the way in which to ensure a prejudiced hearing, Mr. Honn has been damaged and is continuing to be damaged due to the Commission and NASD being unable to provide Mr. Honn on three separate occasions with a non-prejudiced, nonbiased, fair hearing.

44. Mr. Honn has exhausted his remedies.

45. This case is believed to be unique among NASD proceedings. Practitioners in the area of securities litigation and arbitration, including Honn's counsel, have never seen a case with such a tortured history.

46. As long as the NASD allows present employees to testify in certain private arbitration matters on behalf of its broker/dealer members and does not allow investors or individual brokers to have the same rights, individuals such as Brian Honn will continue to waste time and money in prejudiced hearings.

47. As long as the NASD and the Commission continue to allow former NASD officials to testify for NASD member firms, when these officials had direct supervisory or regulatory

authority over or contact with a broker/dealer member during the relevant time period, individuals such as Brian L. Honn will continue to be deprived of their due process and rights to a fair, non-prejudiced and nonbiased hearing.

48. There is no forum where Brian Honn can now go to obtain a fair, non-prejudiced hearing of his claims. This means that Mr. Honn's plea for damages cannot be addressed, nor can his improper Form U-5 be expunged. The longer that the defamation continues as contained on the Form U-5, which is contained in the Central Registration Depository System, the more Mr. Honn's damages will be. As Mr. Honn has no forum under the existing NASD and Commission rules where he may seek relief, the NASD and Commission who have prohibited him from having a non-prejudiced, nonbiased hearing, are liable for the damages he has incurred and continues to incur.

49. These claims against the NASD and the Commission are not merely claims being brought against these entities in their representative capacities as "employers" of the arbitrators who first decided this matter. Rather, it is the NASD's policies, as approved by the Commission, that have three times kept Brian Honn from having a fair, non-prejudiced hearing and which in this case, will continue to keep Brian Honn from having such a hearing.

50. In the Honn v. Steichen case, the statutory framework of the NASD arbitration process, as overseen by the Commission, does not contain sufficient safeguards to control unconstitutional conduct. If not Mr. Rush, under existing NASD rules, other NASD existing employees or past employees who had direct supervision and/or regulatory control over Steichen can come forward as expert witnesses on Steichen's behalf. Though the Commission has expressed concern regarding the rights of investors in the arbitration process, lobbying groups assist investors in this regard. Similarly, the Securities Industry Association ("SIA") , the lobbying group for many NASD firms, protects the rights of

the brokerage firms. Apparently, no one is looking out for the rights of the individual brokers who are suing their former employers, though these brokers do not have any other option but to proceed through the NASD arbitration system.

51. NASD arbitration between individual brokers and their former employers is not a voluntary system. If the broker wishes to sell securities in the United States, he is not allowed to cross out the provision which requires him to arbitrate all claims through NASD arbitration.

52. There is no immunity for the NASD or commission's employees' activities where, as in this case, they play no adjudicatory or prosecutorial role.

53. There has been a willful indifference to the rights of Brian Honn in this matter by the Defendants. There has also been reckless and callous disregard of Mr. Honn's rights and/or specific intent to deprive Mr. Honn of his rights.

54. The claims which Plaintiff Brian Honn was bringing against Steichen were primarily claims for defamation. These claims were based upon inaccurate information contained on a Form U-5 submitted by Steichen to the NASD when a broker leaves a firm, whether voluntarily, as in Mr. Honn's case, or when a broker is terminated for cause.

55. There has been an increase in the number of cases involving brokers suing for defamatory statements made on their Forms U-5 by their former employers following their leaving a brokerage firm. Awards against brokerage firms for defamatory language on a Form U-5 can be extremely costly to brokerage firms.

56. Upon information and belief, the NASD, through the powers delegated to it by the Commission, left its usual impartial role and took on the role of advocate for the brokerage industry in this case, at the strong request of one of its broker members, Steichen. The NASD clearly has a pecuniary interest in directly assisting its members to avoid a flood of these costly defamation disputes.

57. The actions of the NASD, with the approval of the commission, also operate and have operated for Mr. Honn as a restraint of trade. When a broker is not able to effectively work in the industry once he leaves a brokerage firm, due to the firm's ability with the help of the Commission and the NASD to keep him from having any defamation claims addressed, trade is being restrained.

58. When a broker must bankrupt himself in his attempts to have his claims against his former employer heard and he is still not provided with a non-prejudiced hearing, brokerage firm employers are proceeding with full immunity in completing the U-5 form for a broker, no matter whether a state's laws only provide the firm with qualified immunity in reporting to regulators. As oftentimes when a broker is leaving a firm, there is a contest to determine whether the firm or the broker will retain the customers of the departing broker, inaccurate U-5 disclosures which are reported to members of the public through the Central Registration Depository System are an effective tool for a firm to keep the individual broker's customers.

59. As long as the NASD and Commission are overworked and understaffed and thereby unable to focus on disciplining firms who complete inaccurate U-5's for departing brokers, it is up to the private attorneys general like Brian Honn to right these wrongs. When the private attorneys general are not allowed to have their claims heard, the whole system loses.

60. The Commission has also proposed a "three-strikes-and-you're-out" provision for brokers, namely, three reported incidents on a U-5 would cause the broker to no longer be allowed to sell securities. As long as a brokerage firm, is able to damage the individual broker in his business and profession so as to keep him from acting as a broker, and as long as there is no process for having an impartial, non-prejudiced forum to have these matters heard, brokerage firms not only have the

power to take an individual broker's customers away from him, they can even eventually put the broker out of business completely.

COUNT I
VIOLATION OF DUE PROCESS RIGHTS UNDER THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION (INCORPORATING DEFAMATION CLAIM)

61. The above-referenced paragraphs are incorporated herein and made a part hereof.

62. The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

63. Due to the actions of the NASD and the Commission, Mr. Honn's Fifth Amendment rights have been violated.

64. Mr. Honn has been proximately damaged due to these past and continuing violations.

65. Due to Mr. Honn not being able to proceed in a nonprejudiced forum to have his claims heard, Mr. Honn is seeking the amounts which he has incurred thus far in an attempt to have his case heard, as well as the amounts which he would have been entitled to had he had a fair, non-prejudiced hearing due to, inter alia, Steichen's violation of Minn. Stat. § 181.145, Steichen's misrepresentation, Steichen's defamation of Mr. Honn, Steichen's tortious interference with Mr. Honn's business and Mr. Honn's civil conversion claim against Steichen.

66. The damage to Mr. Honn's reputation and business also continues as he cannot be provided with a non-prejudiced forum in his case, in order to seek the expungement of his erroneous U-5 Form.

67. According to the economist expert who was prepared to testify at the arbitration hearing in this matter, the present value of Mr. Honn's damages is approximately $1.5 million. Mr. Honn is seeking these amounts as well as amounts incurred in legal fees and expenses to date, and in bringing this action to trial.

68. Plaintiff is seeking compensatory damages and will move this Court to amend his Complaint pursuant to Minn. Stat. § 549.191 to add a count for punitive damages.

COUNT II
VIOLATION OF §§ 1 AND 2 OF THE SHERMAN ACT, 15 U.S.C. §§ 1 AND 2

69. The above-referenced paragraphs are incorporated herein and made a part hereof.

70. The above-referenced occurrences were the result of a conspiracy between representatives of the NASD and its member brokerage firms and the commission in restraint of trade and to create a monopoly.

71. Plaintiff is seeking treble damages due to these improper actions.

COUNT III
COMMON LAW RESTRAINT OF TRADE

72. The above-referenced paragraphs are incorporated herein and made a part hereof.

73. The above-referenced actions by Defendants resulted in restraint of trade under common law.

74. Plaintiff Honn has been proximately damaged by these improper actions in an amount to be determined at trial.

COUNT IV
TORTIOUS INTERFERENCE WITH BUSINESS

75. The above-referenced paragraphs are incorporated herein and made a part hereof.

76. The above-referenced actions were taken with the intention of interfering with Mr. Honn's business and have had this effect.

77. Plaintiff Honn has been proximately damaged by Defendants' actions in an amount to be determined at trial.

PRAYER FOR RELIEF

Plaintiff Brian Honn seeks relief in the above-referenced matter as follow:

1. For the present value of his future damages due to his not being able to have a non-prejudiced hearing on his claims, in an amount in excess of $1,500,000.00;

2. For costs, expenses and attorneys' fees incurred to date in his preparation for and/or attendance at three separate arbitration hearings and related matters, none of which resulted in his having a non-prejudiced hearing of his claims;

3. For treble damages pursuant to 15 U.S.C. §§ 1 and 2; and

4. For attorneys' fees, costs, interest and other relief the Court deems just and proper.

Plaintiff reserves the right to bring a motion to add a punitive damage count.

JURY TRIAL DEMANDED

Dated: February 28, 1996

s/s

Rebecca E. Bender, #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR PLAINTIFF
BRIAN L. HONN

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, subd. 2, to the party or parties against whom the allegations in this pleading are asserted.

Dated: February 28, 1996 s/s

Rebecca E. Bender, #139075

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff, **ORDER AND MEMORANDUM**
File No. CT 94-15904

v.

R.J. Steichen and Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 15th of December, 1994, on Plaintiffs motion to vacate arbitrators' award and Defendants' motion to confirm arbitration award at the Hennepin County Government Center, Minneapolis, Minnesota.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff, Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Plaintiff's motion to vacate the arbitrators' award pursuant to Minn. Stat. §572.19 and 9 U.S.C. §10 is granted.

2. This arbitration matter is remanded to the New York City Arbitration office of the National Association of Securities Dealers, Inc., Attention: Deborah Massuci, Director of Arbitration. Non-Minnesota arbitrators shall be appointed to decide this matter upon rehearing.

3. Plaintiffs request for attorneys' fees is granted in the amount of $300.00.

4. Defendant's request for attorney's fees is denied.

5. The attached Memorandum is incorporated herein and made a part of this order.

BY THE COURT:

Dated: January 20, 1995.

s/s
Delila F. Pierce
Judge of District Court

MEMORANDUM

Facts

This matter comes before the Court on Plaintiffs motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same.

Plaintiff, a securities broker, brought an action against his former employer, R.J. Steichen and Company (R.J. Steichen), a brokerage firm, and its president/owner John E. Feltl, for defamation, breach of contract and misrepresentation, after Plaintiff had voluntarily left the employment of R.J. Steichen.

Brokers are required, under the Rules of the NASD, to have their claims decided by an NASD arbitration panel. Therefore, the case was heard by a panel of arbitrators appointed by the NASD. The NASD panel awarded Plaintiff $7312.50 together with prejudgment interest against Defendants.

Defendants allege that Plaintiff's discontent with the award is the underlying reason for his motion to vacate the decision and re-litigate his claims. Defendants contend that Plaintiff availed himself of all of the advantages of arbitration until Plaintiff received an award with which he was dissatisfied. Defendants also claim that at the end of the arbitration, all parties agreed that they had received a fair and impartial hearing on the issues. Defendants contend that because Plaintiff has received a fair hearing, this Court should confirm the NASD arbitrators' award.

Plaintiff, however, argues that the arbitration proceeding was unfair. Plaintiff contends that the arbitrators' award was procured by corruption, fraud or other undue means. In addition, Plaintiff claims that there was evident partiality and misconduct which affected the hearing. Finally, Plaintiff

claims that the NASD arbitrators exceeded their power, and thus prejudiced his rights. Plaintiff urges the court to vacate the NASD arbitrators' decision under Minn. Stat. §572.19.

The Law

There is a strong policy in Minnesota favoring arbitration, and judicial intervention has been carefully circumscribed. Deebout v. St. Paul Fire & Marine Ins. Co., 365 N.W.2d 271, 173 (Minn. Ct. App. 1985). Minnesota encourages arbitration as a speedy, informal and relatively inexpensive procedure for resolving disputes. Ramsey County v. AFSCME Council 91 Local 8, 309 N.W.2d 785, 789 (Minn. 1981).

However, Minn. Stat. §572.19 provides that under certain circumstances, a court is required to vacate an arbitration award. Minn. Stat. §572.19 provides in pertinent part:

> Upon application of a party a court shall vacate an award where:
>
> 1. The award was procured by corruption, fraud or other undue means;
>
> 2. There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;
>
> 3. The arbitrators exceeded their powers; or
>
> 4. The arbitrators so conducted the hearing, contrary to the provisions of Section 572.12, as to prejudice substantially the rights of a party.

Minn. Stat. §572.19.

The Minnesota statutory section is modeled after 9 U.S.C. §10 of the Federal Arbitration Act. 9 U.S.C. §10 provides in relevant part:

> In any of the following cases the United States Court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration:
>
> 1. Where the award was procured by corruption, fraud or undue means;
>
> 2. Where there was evident partiality or corruption in the arbitrators, or either of them;
>
> 3. Where the arbitrators were guilty of misconduct... in any misbehavior by which the rights of any party have been prejudiced; or
>
> 4. Where the arbitrators exceeded their powers.

9 U.S.C. §10. Any one of these individual findings is sufficient, in and of itself, to vacate the arbitrators' award.

The standard of judicial review of arbitration procedures is whether a party to an arbitration has been denied a fundamentally fair hearing. See Baar v. Tigerman. 140 Cal. App. 3rd 979 (Cal. 1983).

The test to be applied is that of a reasonable person. More specifically, an arbitration award must be vacated upon a finding of "evident partiality" which exists "where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." Local 814 Internat'l Bd. of Teamsters v. J & B Installer & Moving, Inc., 878 F.2d 38, 40 (2nd Cir. 1989). Courts should consider the totality of the circumstances in deciding the existence of evident partiality.

U.S. v. International Broth. of Teamsters, 814 F. Supp. 1165 (S.D.N.Y.).

Discussion

Plaintiff argues that the award should be vacated since Craig Landauer, an NASD official, was allowed to testify on behalf of the Defendants as an expert witness.

Defendants raise the argument that Landauer was not, in fact, an expert witness. This court disagrees. Mr. Landauer appeared voluntarily and had no direct factual information concerning this dispute. Rather, Mr. Landauer was solely offering his opinion testimony. Therefore, Mr. Landauer is considered an expert witness.

Allowing an NASD employee to testify as an expert on behalf of the Defendants in an NASD proceeding, where NASD selects the arbitrators to hear a particular dispute, presents at the very least, bias and prejudice. Plaintiff equates this to having one judge sitting in a courtroom, calling in a judge from the courtroom next door to provide some testimonial insight for the jury, while indicating that it is the defendants in the case which have called the judge to testify. The Court agrees.

Allowing an NASD official to testify on behalf of Defendants places Plaintiff at an extreme disadvantage before the arbitration panel. Clearly, admitting such testimony raises questions both as to the fairness of this proceeding and whether or not the NASD arbitrators may have had a difficult time disagreeing with a NASD employee.

Furthermore, because of Plaintiff's counsel's concern regarding the activities in this arbitration proceeding, counsel contacted William R. Schief, an NASD Vice President in charge of Regional Attorneys/Enforcement. Plaintiff's counsel received an official response regarding the validity of this testimony from Schief. In that letter, Schief stated that "[t]he NASD has a longstanding policy not to provide staff persons

as so-called expert or technical witnesses in private litigation or in arbitration proceedings."

This letter makes clear that the NASD does not approve of its employees testifying in arbitration matters. In this case, the NASD overstepped their own policies and rules. The court therefore finds that allowing an NASD official to testify in the arbitration proceeding was unfair and therefore prejudiced the Plaintiff.

Plaintiff's also contend that the proceeding was corrupted by the NASD coordinator requesting a job from the securities industry panelist, James Kaiser, a former Paine-Webber manager.

The arbitration proceeding at issue concerned misrepresentation, defamation and breach of contract and thus in accordance with the NASD Rules, two persons not affiliated with the securities industry and one person designated as an affiliate of the securities industry, were chosen to decide the dispute between the parties.

Apparently, during a break in the arbitration hearing, Sharon Kranz, the Chicago NASD Case Administrator was talking to James Kaiser, the securities industry arbitrator on the panel. Kranz, a representative of the impartial sponsoring entity, was discussing with Kaiser whether Kaiser knew of any jobs for her in the securities industry.

It is the duty of the NASD Case Administrator (Kranz) to see that the hearings are conducted in an impartial manner. it therefore follows that she must be an impartial source of information owing nothing to the industry. Clearly, there is too close of a professional connection between the NASD Case Administrator and the arbitration panel deciding a dispute for favors to be requested of a panel member.

Such behavior, while not directly related to the subject matter of the arbitration at issue, does, however, lend itself to the appearance of impropriety and thus undermines the necessary impartiality required in arbitration proceedings.

For the foregoing reasons, the Court finds that the arbitration proceeding failed to allow Plaintiff a fundamentally fair hearing. The proceeding lacked the necessary impartiality required of an arbitration panel and thus prejudiced Plaintiff's rights. Therefore, the Court must grant Plaintiff's motion to vacate the arbitrators' award pursuant to Minn. Stat. §572.19 and 9 U.S.C. §10 and deny Defendants' motion to confirm same.

DFP

— *NASD* —

National Association of
Securities Dealers, Inc.
1735 K Street, N.W.
Washington, D.C. 20006-1506
(202) 728-8000

October 28, 1994

Ms. Rebecca E. Bender
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, MN 55402-1021

Dear Ms. Bender:

In your recent letter to John Pinto, you mentioned that you represented certain clients in numerous NASD arbitration proceedings and you asked how you would go about arranging for an NASD employee, such as regional counsel, assistant district administrator or an NASD representative who has drafted a particular notice to members to testify in your clients' private arbitration proceedings.

The NASD has a long-standing policy not to provide staff persons as so-called "expert" or "technical witnesses" in private civil litigation or in arbitration proceedings. Various reasons support this policy, including the overwhelming burden on the NASD staff if such testimony were provided, given the thousands of NASD arbitration proceedings each year. Moreover, our policy is identical to that of other self-regulatory organizations and administrative agencies, such as the Securities and Exchange Commission.

Exhibit B

I regret that we are unable to assist you in this regard.

Very truly yours,

s/s
William R. Schief
Vice President
Regional Attorneys/Enforcement

WRS/zkf

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

November 18, 1994

Deborah Masucci
Director of Arbitration
National Association of Securities
Dealers, Inc.
33 Whitehall Street
New York, NY 10004

Re: Honn v. R.J. Steichen and Company, et al.
NASD File No. 93-02443

Dear Ms. Masucci:

I am enclosing a courtesy copy of the Motion to Vacate the Arbitrators' Award in the above-referenced arbitration. A number of occurrences took place in this arbitration, which I would like to think are atypical of the NASD arbitration process. I have been practicing primarily in the area of securities litigation and securities arbitration for the last 12 years. Over the last one and one-half years, I have represented parties in approximately 17 different NASD arbitrations, representing investors, brokers and broker-dealers.

I would appreciate hearing your thoughts concerning the proper relationship between the NASD Arbitration Office and its sister NASD office. As set forth in my Memorandum, I am very concerned about the NASD's apparent willingness to

provide voluntary testimony to certain parties, namely their member broker-dealers, but not to other parties who would properly subpoena their testimony.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt
Enclosure

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

January 26, 1995

Deborah Masucci
Director of Arbitration
National Association of Securities
Dealers, Inc.
33 Whitehall Street
New York, NY 10004

Re: Honn v. R.J. Steichen and Company, et al.
NASD File No. 93-02443

Dear Ms. Masucci:

I am enclosing the order vacating the Arbitrators' Award in this matter. Please have an NASD New York City staff person assigned to this case and non-Minnesota arbitrators appointed as soon as possible, so this case may be reheard promptly.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt
Enclosure

cc: Steven E. Rau, Esq.

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

February 3, 1995

Deborah Masucci
Director of Arbitration
National Association of Securities
Dealers, Inc.
33 Whitehall Street
New York, NY 10004

Re: Honn v. R.J. Steichen and Company, et al.
NASD File No. 93-02443

Dear Ms. Masucci:

Last week I sent you a letter asking that the Honn arbitration matter (which was vacated by a Minnesota Court) be set for hearing through the New York NASD Arbitration Office and that arbitrators be appointed in this matter. Due to the fact that the problems inherent in this NASD arbitration caused this matter to be required to be heard again, I would appreciate your seeing to it that this matter is handled promptly.

Counsel to the Respondents have filed an appeal in this case. However, on behalf of my client, Mr. Honn, due to the delays in getting an initial decision in this matter, and the problems with the process in this case, I would greatly appreciate your proceeding to set this matter for hearing and to assign

arbitrators, so that once Respondents' counsel has exhausted the appeal process, this matter may be promptly heard.

Thank you in advance for your attention to this matter.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt

cc: Steven E. Rau, Esq.

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

March 8, 1995

Deborah Masucci
Director of Arbitration
National Association of Securities
Dealers, Inc.
33 Whitehall Street
New York, NY 10004

Re: Honn v. R.J. Steichen and Company, et al.
NASD File No. 93-02443

Dear Ms. Masucci:

I am attaching copies of the two letters which I sent to you previously in an attempt to get the NASD to abide by the enclosed Order of the Minnesota District Court. I have not heard any response from you or from your office with respect to setting this matter for arbitration pursuant to the Judge's order.

Steven Rau, counsel to Respondents R.J. Steichen and Jack Feltl, was attempting to appeal the District Court Judge's order which vacated the NASD arbitrators' award. Mr. Rau attempted to have this matter heard by the Court of Appeals of the State of Minnesota as a matter of right and pursuant to a Petition for Discretionary Review. As you will see from the

enclosed March 7, 1995 Order, the Court of Appeals has refused to hear Mr. Rau's appeal on both of these fronts.

I look forward to hearing from you very shortly with the names of potential arbitrators and with hearing dates. I am hopeful that as this rehearing has been necessitated by the conduct of the NASD and the NASD appointed arbitrators, that you will not wish to delay the rehearing any more than necessary.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt
Enclosure

cc: Steven E. Rau, Esq.

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

March 29, 1995

VIA FEDERAL EXPRESS

Deborah Masucci
Director of Arbitration
National Association of Securities
Dealers, Inc.
33 Whitehall Street
New York, NY 10004

Re: Honn v. R.J. Steichen and Company, et al.
NASD File No. 93-02443

Dear Ms. Masucci:

I am puzzled and concerned by your failure to respond in any way to three previous letters sent to you, advising you of certain actions you are being required to take as the Director of NASD Arbitration, to reschedule the above-referenced arbitration matter. As I have advised you three times previously, the NASD arbitration decision in this matter has been vacated by the Minnesota District Court. R.J. Steichen and John Feltl, through their counsel, attempted to appeal this Minnesota District Court decision, but were unsuccessful in doing so.

As you are the Director of Arbitration for the NASD, I am at a loss as to how to proceed when you continue to ignore an order of a Minnesota Court. I would prefer to not go to the expense of obtaining another Court Order or Writ of Mandamus which would order you to comply with the previous Court's order directed to you. Certainly, if I am forced to take this step on behalf of my client, I will be required to bill the NASD for costs and attorneys' fees incurred in my being required to take this very unusual step.

If your failure to respond to my previous letters is an indication that you do not believe the NASD Arbitration Department is able to provide my client with a fair hearing in this matter, please advise me of such immediately in writing, and I will advise my client to proceed in state court.

I look forward to hearing from you immediately, so that I will not be required to continue incurring additional fees and expenses on behalf of my client due to your noncompliance with a Minnesota District Court Order.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt
Enclosure

cc: John Pinto

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

Valerie Bailey, Esq.
Senior Attorney
National Association of Securities Dealers, Inc.
22 Whitehall Street
New York, New York 10004

Re: Honn v. R.J. Steichen and Company and Feltl
NASD Arbitration No. 93-02443

Dear Ms. Bailey:

This letter serves as a response to the September 7, 1995 letter which was sent to you by Mr. Rau, counsel to R.J. Steichen and John Feltl, enclosing a Motion to postpone the rehearing of this arbitration matter. Mr. Rau's letter and motion, must not be submitted to the arbitration panel in this matter, or we will be required to seek a new panel to decide this matter. What Mr. Rau is now doing is a blatant attempt to prejudice this panel, prior to their hearing any evidence, based upon the ruling of the previous panel in a hearing which was found by a court to be biased and prejudicial.

What Mr. Rau is doing is nothing new. Ever since the NASD award was vacated by the Hennepin County District Court, Mr. Rau has attempted to postpone the rehearing in this matter. He has tried and failed twice at the Minnesota Court of Appeals and failed once with the Minnesota Supreme Court. Neither of these bodies found the issues raised by Mr. Rau to be compelling enough to require the judge's vacatur

Exhibit D

decision to reviewed by any higher court. Now Mr. Rau has taken the extreme step of seeking the United States Supreme Court to review the Minnesota Appellate Court's failure to review the district court's vacatur! Mr. Rau has obtained what he has sought thus far, i.e. postponing the rehearing of this case and increasing the costs to Mr. Honn, the Claimant, an individual. (The printing cost alone, for Mr. Honn to oppose Steichen's United States Supreme Court Petition amounted to thousands of dollars. These amounts will certainly be added to Mr. Honn's damages, as well as additional damage caused to Mr. Honn due to Respondent Feltl defaming Mr. Honn in the local press prior to the award being vacated).

Mr. Rau mentioned in a previous letter to you that the Supreme Court would rule on his petition the week of October 2, 1995. Now he states that the Supreme Court would decide this matter, at the earliest the week of October 2, 1995. Mr. Rau is continuing to play games with the process and this behavior should not be tolerated. I am certain that if we attempt to reschedule this case at this late date, we will hear that either Mr. Rau, or his clients are unavailable for any time in the near future, again delaying the justice that brokers such as Mr. Honn deserve.

There is no new information which Mr. Rau has obtained which required his filing of this motion. As I mentioned to you before, if the Court has not ruled prior to the first scheduled hearing dates, we can all deal with that issue. However, to anticipate problems before they arise, when Mr. Rau has previously advised you that his petition will be ruled upon prior to the first scheduled dates, is to allow another "respondent's delay" for no good reason.

Thank you for your attention to this very serious matter.

Very truly yours,

s/s
Rebecca E. Bender

cc: Steven Rau, Esq.

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

September 27, 1995

VIA FAX AND MAIL

Valerie Bailey, Esq.
National Association of Securities
Dealers, Inc.
NASD Financial Center
33 Whitehall Street
New York, NY 10004

Re: Honn v. R.J. Steichen and Company, et al.
NASD File No. 93-02443

Dear Ms. Bailey:

As you know, I sent you a letter last week advising the NASD that the arbitrators in the above-referenced action should not be provided copies of Respondents' Motion to Stay the Arbitration, as it contained information which was clearly prejudicial to my client and which would not allow my client to have a fair, unbiased hearing. Specifically, Respondent's counsel Mr. Rau made reference in his motion to the dollar amount of the award in the previous NASD hearing, which was later vacated by the Minnesota District Court as being the result of a biased, prejudiced hearing. As you have seen fit to provide copies of Respondents' motion to the entire panel (while I was in another unrelated NASD arbitration), I am

now required, as I told you I would be, to challenge for cause each of the arbitrators on the panel to whom you have provided this prejudicial information contrary to the request of Claimant, Mr. Honn.

If the NASD denies these challenges for cause, Mr. Honn will go back to state court and will obtain an injunction requiring the NASD to appoint new, impartial, nonprejudiced, nonbiased arbitrators.

Though I am presently involved in approximately 15 NASD and NYSE arbitrations, the Honn arbitration certainly has the most tortured and unnecessarily lengthy history. As I advised you, it was due in part to the errors of NASD arbitrators and NASD employees, which caused this arbitration award to be vacated by the district court. It is, at a minimum, disappointing when the NASD has again in this case taken a position which clearly prejudices my client once again.

In addition, as I mentioned to you in a letter months ago, and as I confirmed with you on the telephone last week, while I was in the midst of another unrelated NASD arbitration, this arbitration should be held in Minneapolis rather than Chicago. The only reason for having non-Minnesota arbitrators was to avoid the inherent problems in having arbitrators appointed from the Minnesota pool, who are very familiar with the other Minnesota NASD arbitrators whose wrongdoing, at least in part, required that the previous NASD award be vacated. As the vacatur required was due to NASD employee and NASD arbitrator wrongdoing, my client, Mr. Honn, should certainly not be required to fly to Chicago, especially when almost all key witnesses are in Minneapolis!

I look forward to your prompt decision regarding Mr. Honn's challenge for cause of the three sitting arbitrators. As anyone

would know who has been involved in this hearing from its inception, the only person who has lost again due to the actions of Respondents, Respondents' counsel, and the NASD's failure to disallow clearly prejudicial material from making its way into the arbitrators' hands, is my client Brian Honn.

Very truly yours,

s/s
Rebecca E. Bender

REB/tt

cc: Deborah Masucci
Jim O'Donnell
Steven Rau

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v.

ORDER

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

On October 12, 1995, at 9:00 A.M., this Court heard the Plaintiff's Motion to order Impartial, Non-Prejudiced Arbitrators and For Sanctions pursuant to Minnesota Statute § 572.19, et seq. and this Court's inherent powers. This Court retains jurisdiction over this matter, previously remanded by this Court to the New York NASD Office with non-Minnesota arbitrators to ensure a nonprejudiced rehearing for Mr. Honn. Rebecca E. Bender appeared as counsel to Plaintiff Brian L. Honn. Steven E. Rau appeared as counsel to Defendants R.J. Steichen and Company and John E. Feltl.

Based upon all of the pleadings and exhibits submitted by counsel to the parties and the argument of counsel at the hearing,

IT IS HEREBY ORDERED:

1. A new panel of non-Minnesota arbitrators who have not been advised by the National Association of Securities Dealers, Inc., or counsel to the parties of the previous outcome of the Honn v. Steichen arbitration, or of the fact that an NASD official, contrary to NASD policy, testified as an expert witness voluntarily on behalf of R.J. Steichen and John Feltl, shall be appointed immediately, so they are able to sit in Minnesota for the scheduled October 23-25, and November 1-3, 1995 hearing dates.

2. Should the NASD, or any of its employees or persons acting on its behalf advise any of the newly appointed arbitrators in this matter, either directly or indirectly, orally or in writing, at any time prior to the award in the rehearing of this matter, of the previous outcome of the Honn v. Steichen arbitration, or of the fact that an NASD official, contrary to NASD policy, testified voluntarily on behalf of R.J. Steichen and John Feltl, the NASD shall be sanctioned in an amount to be determined by the Court, such amount being payable to Brian Honn for the apparent inability of the NASD (for a third time) to provide Mr. Honn with a non-prejudiced and non-biased hearing, though Mr. Honn, a broker, is required by law to have his disputes handled in an NASD forum. Additional sanctions may also be ordered by this Court to compensate both parties for fees and costs incurred and/or to be incurred in rehearing this matter.

3. Should any of the parties, or counsel to any of the parties, or any employee or agent (present or former) acting for or at the direction of any of the parties or their counsel divulge during the arbitration or prior to the award in the rehearing of the arbitration to any of the members of the arbitration panel in this matter the outcome of the previous arbitration, or the fact that an NASD official voluntarily testified as an expert witness on behalf of R.J. Steichen and

John Feltl, contrary to the NASD's policy, sanctions shall be determined by the Court and be payable jointly and severally to the damaged party by the person divulging and the person or persons, parties, and/or counsel who advised or suggested to such person to make such a disclosure to the arbitrators.

IT IS SO ORDERED.

BY THE COURT:

Dated: October 13, 1995.

s/s

Delila F. Pierce
Hennepin County District Court
Judge

Richard J. Rush

33301 E. Russell Road
Oak Grove, MO 64075
(816) 229-0831

Work Experience

June 2, 1969 - May 31, 1995

Continuously employed by the National Association of Securities Dealers, Inc. (NASD). The NASD is charged with the responsibility of regulating the over-the-counter securities markets. This task encompasses both regulation of NASD member broker-dealer firms and the regulation and operation of the NASDAQ system.

I started with the NASD as an examiner-trainee in the Chicago, Illinois district office in June, 1969. I rapidly progressed to the position of Supervisor of Examiners before transferring to the Cleveland, Ohio district office as Assistant District Director. Being too far from home (A native of St. Louis), I requested a transfer to the Kansas City district office. I was employed in that office for approximately 22 years, ascending to the position of Associate District Director before retiring on May 31, 1995.

Major responsibilities included the supervision of routine and special examinations to ensure that all regulatory programs were carried out in a timely fashion. Some examples of special examinations are the investigation of terminations for cause and customer complaints, branch office examinations, penny stock broker/dealers and the sale of mutual funds on the premises of depository institutions. I hired examiners, participated in their training and coordinated

and conducted meetings of the Business Conduct Committee where the results of the staff's examinations were reviewed. Closely related to this responsibility was the coordination of the disciplinary docket with the District's Regional Counsel. I was also responsible for responses to the SEC in their oversight reviews of the district office's operations and examination efforts.

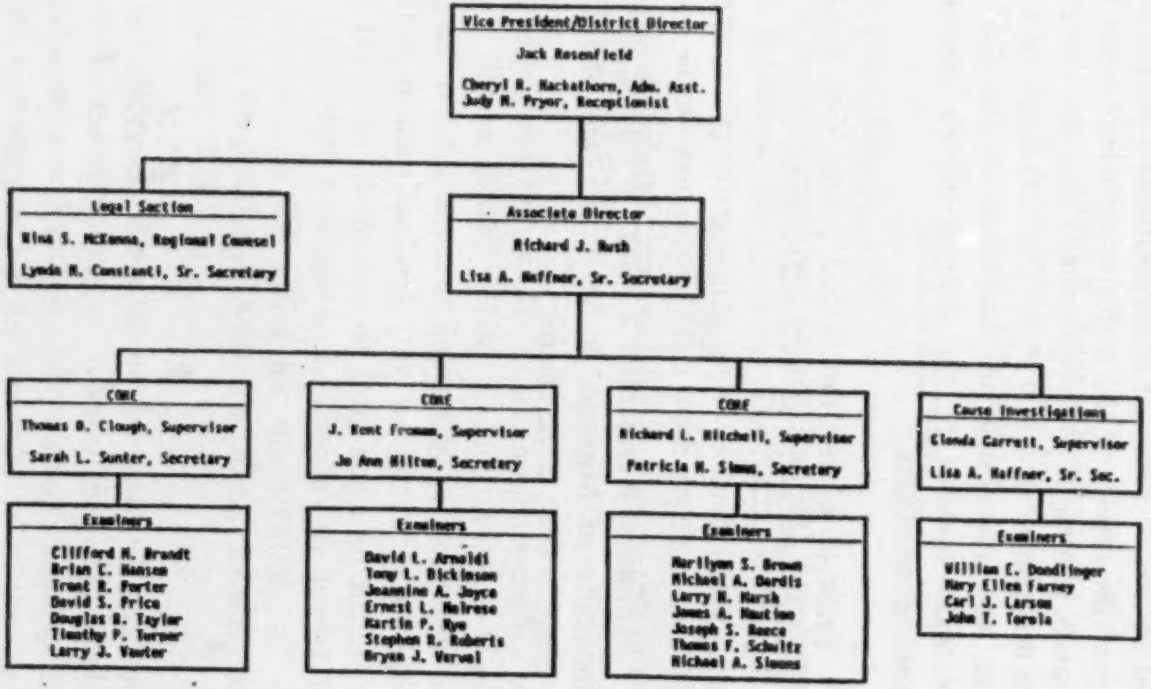
Prior to joining the NASD I was Vice President and registered principal with an NASD member.

Education

Attended Westminster College in Fulton, Missouri, the University of Missouri at St. Louis, and the College of DuPage in Glen Ellyn, Illinois.

Exhibit E

NASD DISTRICT NO. 4 STAFF



As of March 22, 1983

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC.

Brian Honn,

Claimant

v.

R.J. Steichen and Company and John E. Feltl,

Respondents.

SUBPOENA FOR DOCUMENTS

VIA TELEFAX AND FED EX

NASD Case No. 93-02443

TO: Tom Moran, Esq., 1735 K Street, N.W., Washington, D.C. 20006

As background for the document requests herein relating to Richard Rush, Richard Rush, a former Assistant NASD District Director in Kansas City, has been identified as an expert witness for Respondents. Mr. Rush, though no longer employed by the NASD, was serving as the NASD's Assistant District Director during the time this arbitration hearing previously took place in 1994. The arbitrators' decision in that first hearing was vacated by the Minnesota State Court and a new hearing will be proceeding in approximately one week.

Claimant broker Brian Honn believes that the NASD should not be able to use its privileges as a sword and a shield. Namely, when Mr. Rush testifies about the practices of a firm, R.J. Steichen, which was under investigation at the NASD when he was an NASD official and when Mr. Rush was specifically the recipient of a letter disclosing improper

practices at Steichen while this arbitration matter was pending in 1994, he will waive any privilege asserted by the NASD regarding R.J. Steichen when he begins to testify. Though this issue has been raised with counsel to Steichen and its owner/principal John Feltl, the Steichen Respondents have refused to remove Mr. Rush as an expert witness. Steichen has no right to object to these requests, as well, due to this position which it has taken.

YOU ARE HEREBY COMMANDED to produce the following documents to Rebecca E. Bender & Associates, P.A., Minnesota Law Center, 514 Nicollet Mall, Suite 570, Minneapolis, Minnesota 55402-1021 on or before Friday, October 20, 1995. (A prepaid Federal Express envelope is included for your convenience, or you may send the documents via telefax to 612-332-4728.)

1. Copies of all Forms U-4 and U-5 for four individuals and one broker-dealer: Brian Honn (employed by Principal Financial, and working in Minnesota), John Feltl (employed by R.J. Steichen and working in Minnesota), Mary Jo Feltl (employed by R.J. Steichen and working in Minnesota) and Richard Rush (former NASD Assistant District Director in Kansas City), as well as the broker-dealer R.J. Steichen and Company, with its headquarters in Minnesota.

2. Records, of any and all customer complaints; disciplinary actions, inquiries or investigations; state regulatory actions, inquiries or investigations and NASD actions, inquiries or investigations commenced with relate or refer to the above referenced four individuals and one entity.

3. Any other information referring or relating to the four above referenced individuals and one entity contained on the CRD system.

4. Any and all documents reflecting Internal investigations and/or inquiries, formal or informal into the practices of R.J. Steichen and Co. and/or its principals and/or officers, by the NASD and/or SEC or state regulators from 1985 through the present.

5. Any and all documents sent by, drafted by, signed by, reviewed by, sent to and/or approved by Richard Rush and/or the NASD Kansas City District Director Jack Rosenfield relating to, referring to or mentioning R.J. Steichen, John Feltl and/or Mary Jo Feltl from 1985- the present.

6. Employment and personnel files and documents relating to the employment of Richard Rush at the NASD, including but not limited to internal reviews, investigations, inquiries, promotion and other evaluations, etc.

7. Any and all documents referring, relating to or mentioning the U-5 "Investigation" performed by the NASD in 1993 relating to Brian Honn, for the U-5 (and any amendments) filed by R.J. Steichen when Mr. Honn voluntarily left the firm.

YOUR FAILURE TO PRODUCE THESE DOCUMENTS IN RESPONSE TO THIS SUBPOENA WILL SUBJECT YOU TO PUNISHMENT FOR CONTEMPT OF COURT. Copy costs incurred by you will be reimbursed by the undersigned, as counsel to Claimants. Thank you in advance for your prompt attention to this matter.

s/s

Rebecca e. Bender, Esq.
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220
(612) 332-4728

Issued this 16th day of October, 1995, pursuant to NASD Code of Arbitration Procedure

NASD

National Association of Securities Dealers, Inc. • 1735 K Street, NW • Washington, DC 20006-1500 • 202-728-8000

Thomas P. Moran
Attorney

Direct: (202) 728-8401
Fax: (202) 728-8894

November 2, 1995

Ms. Valerie Bailey, Esq.
Arbitration Department
National Association of Securities
Dealers, Inc.
33 Whitehall Street
New York, New York 10004

Re: Honn v. R.J. Steichen and Company & Feltl
NASD Arbitration No. 93-02443

Dear Ms. Bailey:

Enclosed please find a subpoena served on the NASD by the claimant in connection with the above-captioned arbitration along with NASD's objections to the subpoena. NASD requests that this discovery matter be brought to the attention of the arbitrators for resolution.

It has also come to our attention that former NASD employees may testify in the upcoming arbitration and we request that it be made clear to the arbitrators that these ex-employees are testifying in their personal capacities not on

Exhibit G

behalf of the NASD and do so without the approval or disapproval of the Association.

Very Truly Yours,

s/s
Thomas P. Moran
Office of General Counsel

NASD

National Association of Securities Dealers, Inc. • 1735 K Street, NW • Washington, DC 20006-1500 • 202-728-8000

Thomas P. Moran
Attorney

Direct: (202) 728-8401
Fax: (202) 728-8894

November 2, 1995

Rebecca E. Bender, Esq.
Minnesota Law Center
514 Nicollet Mall - Suite 570
Minneapolis, Minnesota 55402-1021

Re: Honn v. R.J. Steichen and Company & Feltl
NASD Arbitration No. 93-02443

Dear Ms. Bender:

This will acknowledge receipt by the NASD of a subpoena (copy attached) in the above-referenced case. Initially, the NASD objects to the use of an attorney-signature subpoena as being in violation of Minnesota Statute Section 572.14 which authorizes issuance of subpoenas only by arbitrators.

As you are aware, you have been previously provided the following items in response to the subpoena:

CRD records for Brian Honn, John Feltl and Mary Jo Feltl and R.J. Steichen

U-4 and U-5 Forms for Brian Honn, John Feltl

Exhibit H

BD Forms for R.J. Steichen and Company

Final disciplinary decisions for R.J. Steichen and Company

Personnel File of former NASD employee Richard Rush

To the extent that NASD Internal Review documents relating to Mr. Rush exist, NASD objects to production as those documents were prepared by or under the direction of an attorney and are protected by the attorney-client communication privilege and the attorney work product privilege and deal with matters not germane to either your client, or R.J. Steichen and Company, or the subject matter of the pending arbitration which is limited to alleged defamation of your client by R.J. Steichen and Company in a Form U-5 filed with the NASD in Rockville, Maryland not Kansas City where Mr. Rush was employed.

Next, to the extent documents requested have not been supplied, the NASD objects to your subpoena as overbroad and unduly burdensome. In 1995, the NASD has received approximately 1,000 subpoenas regarding cases in which it was not a party. Your request for documents from the NASD, a non-party, not-for-profit corporation, subjects the NASD to undue and unnecessary burden and expense. We object to any documents which can be considered attorney work product or protected by the attorney-client privilege. The NASD further objects to the extent that the requested items are obtainable from the other parties in the above-captioned matter. Additional, specific objections to your requests are as follows:

Exam Reports and Investigative Files

The NASD objects to production of documents relating to analyses, opinions or evaluations prepared by NASD employees, customer complaints, and documents reflecting District Committee or Board of Governors considerations and deliberations, which are protected by the investigatory file privilege. The investigatory file privilege was specifically intended to apply to actions to enforce the securities laws. H. Rep. No. 1497 at 11, 89th Cong., 2d Sess. (1966). In Ross v. Bolton, 106 F.R.D. 22 (S.D.N.Y. 1985), the protection against disclosure of investigatory records was extended to NASD investigatory records:

> There is strong public interest in maintaining the integrity of effective industry self-regulation. This interest would clearly be undermined by making NASD files fair game for any of the thousands of private securities fraud litigants across the country who wish to shortcut their own discovery efforts and instead to reap the benefits of the Association's ongoing, statutorily governed work. 15 U.S.C. §§ 78o-3, 78s. The public interest in maintaining certain functions and relationships has been a primary factor in limiting discovery absent a formal privilege.

The NASD is the primary examining authority for the over-the-counter securities industry in the United States and in that capacity conducts investigations of NASD member firms regarding their financial condition and compliance with securities laws and regulations. The NASD does not have the authority to issue administrative or judicial subpoenas to aid the NASD in obtaining information for its investigations. As a result, the NASD's investigative efforts are largely dependent upon information that is supplied voluntarily by customers,

member firms and others. The NASD's quasi-public role has been acknowledged by the courts in Austin Municipal Securities, Inc. et al. v. NASD et al., 575 F.2d 676 (5th Cir. 1985); Merrill Lynch Pierce Fenner & Smith, Inc. et al. v. NASD et al., 616 F.2d 1363 (5th Cir. 1980); and First Jersey Securities, Inc. et al. v. Bergen, 605 F.2d 690 (3d Cir. 1979), cert. denied, 444 U.S. 1074 (1980).

In furtherance of the voluntary production of information, the NASD's Board of Governors has directed all investigative information be accorded confidential treatment and has prohibited disclosure of such information except for limited registration information and final disciplinary actions. In conducting investigations and operating the Nasdaq Stock Market, Inc., the NASD often comes into possession of material non-public information regarding issuers and other market participants. The NASD will not disclose such information or any information accorded confidential treatment. Disclosure in excess of this policy would impair the NASD's ability to fulfill its statutory functions.

Regarding your request for specific documents relating to a complaint made to the NASD by a confidential source ("CS") in July 1993 concerning alleged regulatory violations at R.J. Steichen and Company ("RJS"), what follows is a brief description of the contents of NASD's file:

> July 13, 1993 3 page letter from CS to NASD's Richard Rush outlining alleged regulatory violations at RJS.
>
> August 2, 1993 1 page handwritten review memo prepared by NASD employee Dick Mitchell regarding July 13, 1993 letter from CS. Page also contains second review memo made on August 26,

1993 regarding the same allegations. Both reviews conducted together with Richard Rush.

August 3, 1993 5 page memo front NASD employee Larry Marsh to Richard Rush and Dick Mitchell relating to phone interview of CS. CS assured of confidentiality by NASD.

January 19, 1994 2 page letter from CS to NASD's Richard Rush allegiing additional regulatory violations by RJS.

January 1994 notice from NASD's Dick Mitchell regarding RJS's 1994 NASD exam. Also on page is handwritten memo from NASD's Larry Marsh on same subject.

February 25, 1995 handwritten memo of phone conversation between NASD's Richard Rush and CS regarding investigation.

Undated handwritten note from NASD's Richard Rush with CS's phone number and other numbers.

Undated handwritten note by NASD's Larry Marsh relating to allegations against RJS.

As stated above, the NASD objects to providing these or any other confidential documents obtained during the association's investigations of the securities industry.

Communications to the SEC

The NASD objects to your subpoena to the extent that it seeks privileged or otherwise confidential communications

between the NASD and the SEC. The NASD, as a self-regulatory organization, has specific quasi-governmental obligations under the Securities and Exchange Act of 1934, as amended and the Securities Investor Protection Art of 1970, 15 U.S.C. §§ 78(aaa) et seq. The NASD is obligated under these acts to make reports to the SEC or face substantial sanctions for failing to do so. Such communications are privileged or otherwise confidential.

Investigative or Surveillance Techniques

The NASD specifically objects to your subpoena to the extent that it seeks disclosure of any questionnaires, procedures, guidelines, criteria, training or ocher descriptive materials or files relating, to investigative techniques or modalities for surveillance of securities markets and persons engaged in securities activities. Disclosure of investigative techniques or modalities used nationwide would enable individuals to perpetrate wrongful acts in a manner calculated to evade detection thereby compelling a complete overhaul of the NASD's nationwide procedures at considerable expense. The judiciary has long recognized that there is a strong public interest in minimizing disclosure that would tend to reveal law enforcement investigative techniques or sources. See, e.g., Black v. Sheraton Corp. of America, 564 F.2d 531, 545 (D.C. Cir. 1977); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Jabara v. Kelly, 62 F.R.D. 424 (E.D. Mich. 1974); Philadelphia Resistance v. Mitchell, 63 F.R.D. 125 (E.D. Pa. 1972); See generally 2 Weinstein's Evidence ¶ 509 {07} (1975).

Documents Available Without Subpoena

As part of its public disclosure program, the NASD has made a number of documents available without a subpoena,

including arbitration awards, final disciplinary decisions and certain Nasdaq Stock Market historical information. Additionally, the NASD does not object to the production of certain Central Registration Depository ("CRD") records for registered representatives and member firms, although a subpoena is required for such information. A description of the most commonly requested NASD records and their non-subpoena alternatives is attached. Please review the summary to determine if your present and future information requests can be satisfied by the publicly available records.

Very truly yours,

s/s
Thomas P. Moran
Office of General Counsel

cc. Steven Rau, Esq.
701 Fourth Avenue - Suite 500
Minneapolis, Minnesota 55145

Arbitrators
NASD Arbitration 93-02443

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v. **ORDER**

R.J. Steichen and Company and
John E. Feltl,

Respondents/Defendants.

On November 2, 1995, Rebecca E. Bender, counsel to Plaintiff Brian L. Honn, brought an expedited ex parte motion to stay the rehearing of an arbitration, which was previously vacated by this Court. As it appears to this Court, that similar issues to those which required the vacatur previously are now present again, this court is hereby ordering that the rehearing of the arbitration be and hereby is stayed pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and nonprejudiced hearing.

IT IS SO ORDERED.

Exhibit I

Dated: November 2, 1995.

s/Delila F. Pierce
Hennepin County District Court

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Plaintiff,

v. **ORDER AND MEMORANDUM**
FILE NO. CT 94-015904

R. J. Steichen & Company
and John E. Feltl,

Defendants.

The above-entitled matter came on for hearing before the Honorable Delila F. Pierce, one of the judges of the above-named court, on the 21st day of November, 1995, on Plaintiff's motions for sanctions and to strike untimely filings.

Rebecca E. Bender, Esq. appeared for and on behalf of Plaintiff; Steven E. Rau, Esq. appeared for and on behalf of Defendants.

Now, therefore, based on the files, records and proceedings, and the arguments of counsel:

IT IS HEREBY ORDERED:

1. Plaintiff's motion for sanctions is denied.

2. Plaintiff's motion to strike untimely filings is denied.

2. The attached Memorandum is incorporated herein and made part of this order.

Exhibit J

BY THE COURT:

Dated: January 23, 1996.

s/s
Delila F. Pierce
Judge of District Court

1

MEMORANDUM

This matter comes before the Court on Plaintiff's motions for sanctions and to strike untimely filings.

I.

Facts

This matter originally came before the Court on Plaintiff's motion to vacate the arbitrators' decision in the National Association of Securities Dealers, Inc. (NASD) arbitration captioned Brian L. Honn v. R.J. Steichen and Company and John E. Feltl, NASD Case No. 9302443, and on Defendants' motion to confirm same. The Court vacated the arbitration award, finding that when Craig Landauer, an NASD official, testified on behalf of Defendants as an expert witness in an NASD proceeding where the NASD selects the arbitrators to hear a particular dispute, there was "at the very least, bias and prejudice" to Plaintiff. The Court remanded the case to the NASD's New York City Arbitration Office and ordered that non-Minnesota arbitrators be appointed to decide the case upon rehearing.

Prior to rehearing, Defendants, through their counsel, filed a motion for postponement with the NASD New York Office. This motion made reference to the amount of the arbitration award obtained in the original, biased proceeding. Plaintiff attempted to stop this information from getting to the newly-appointed panel, but his efforts were unsuccessful. Plaintiff then sought relief in this Court. The Court ordered that the new panel be removed and advised the parties, their counsel, and the NASD that if anyone mentioned the amount of the previous award or the fact that an NASD official testified on behalf of Defendants at the previous hearing, the Court would impose sanctions. A new panel of non-

Minnesota arbitrators was appointed, and rehearing was scheduled for later the same month.

Before the matter could be heard by the new panel, Plaintiff was again before the Court, seeking to stay the rehearing of the arbitration. Defendants had retained Richard Rush, the former Assistant Director of District IV of the NASD, as their new expert witness. Defendant R.J. Steichen is located in District IV. During the time when the wrongful acts alleged by Plaintiff were taking place, Rush was the number two person, responsible for regulation and discipline of R.J. Steichen. Despite Rush's recent and direct involvement with Steichen, the NASD indicated that it would not prohibit Rush from testifying on behalf of Defendant Steichen. The Court granted Plaintiff's expedited *ex parte* motion to stay the rehearing of the arbitration as it appeared to the Court that similar issues to those which required the vacatur previously were again present.

Plaintiff then brought a motion for sanctions against Defendants and their counsel pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21 subd. 2 (1988 & Supp. 1995), and this Court's order of October 13, 1995. Plaintiff claims that in retaining Rush as their new expert witness and by refusing to withdraw his name after Plaintiff objected, Defendants and their counsel acted in bad faith, needlessly increasing the cost of litigation. Plaintiff seeks sanctions and attorney fees in the amount of $200,000. Defendants contend that the Court does not have jurisdiction over the arbitration process and that Plaintiff had not shown bad faith on the part of Defendants or their counsel.

II.

Motion for Sanctions

Plaintiff has requested that the Court award them sanctions and attorney fees pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21 subd. 2 (1988 & Supp. 1995), and this Court's October 13, 1995 Order. Defendants maintain that the Court does not have jurisdiction over this matter and that Plaintiff has failed to prove that Defendants and their counsel acted in bad faith.

With regard to the Court's jurisdiction in this case, the law is quite clear that the Court does not have the authority to decide the merits of Plaintiff's claims once they have been properly submitted to arbitration. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 404 (1967) ("[A]rbitration procedure, when selected by the parties to a contract, [must] be speedy and not subject to delay and obstruction in the courts."). The trial court may not step into a case submitted to arbitration and tell the arbitrator what to do and when to do it. Titan/Value Equities Group, Inc. v. Superior Court, 29 Cal. App. 4th 482, 488, 35 Cal. Rptr. 2d 4, 7 (Cal. Ct. App. 1994). However, once the court's general equity jurisdiction has been invoked, it may stay an arbitration proceeding on the ground of bias or prejudice. To permit arbitration to proceed under such circumstances would be futile since the award would almost certainly be vacated. Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (1989). See generally 4 Am. Jur. 2d, Alternative Dispute Resolution §165 (1995).

This Court has not been asked to decide the merits of Plaintiff's employment and defamation claims against Defendants. The Court has been asked to stay an arbitration proceeding in a forum which has previously been found, by this Court, to be prejudicial to him and which, in all likelihood, based upon the facts presented to the Court, will be again.

The Court was acting within its authority when it granted Plaintiff's motion to stay the rehearing of arbitration, and the Court has the authority to award sanctions in this case if appropriate.

Plaintiff asks the Court to award sanctions and attorney fees pursuant to Rule 11 of the Minnesota Rules of Civil Procedure, Minn. Stat. §549.21 subd. 2 (1988 & Supp. 1995), and this Court's October 13, 1995 Order. The Minnesota Supreme Court has noted that only minor and insignificant differences exist between Minnesota Rule 11 and Federal Rule 11, and, therefore, cases interpreting the federal rule are valuable guidelines in understanding the purpose and application of the state rule. Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990). Rule 11 places an affirmative duty on attorneys when signing documents to make reasonable inquiry into the factual and legal bases of claims and to determine whether they are grounded in fact and not made for an improper purpose, such as harassment, delay, or increased cost. Minn. R. Civ. P. 11; Uselman v. Uselman, 464 N.W.2d 130, 142 (Minn. 1990). By its terms, Rule 11 applies to "pleadings, motions, or other papers;" conduct *per se* is not subject to Rule 11. Minn. R. Civ. P. 11; Schering Corp. v. Vitarine Pharmaceuticals, Inc., 889 F.2d 490, 496 (3rd Cir. 1989) (Rule 11 sanctions are proper only in situations involving a signed pleading); Simpson v. Welch, 900 F.2d 33, 36 (4th Cir. 1990) ("The rule does not purport to be a means for district courts to sanction conduct in the course of a lawsuit . . . that does not involve the signing of pleadings, motions, or other papers.").

Papers filed in the course of an arbitration proceeding are not subject to Rule 11. Rule 11 does apply to any papers in cases filed in district courts that are related to arbitration proceedings. Thus, actions to compel arbitration, to stay arbitration, to enforce or challenge an arbitration award are subject to Rule 11. Sheet Metal Workers, Local 162 v. Jason

Mfrg., 900 F. 2d 1392 (9th Cir. 1990) . However, the rule does not apply to papers filed in the underlying arbitration itself. Teamsters Local Union No. 430 v. Cement Express, Inc., 841 F.2d 66 (3rd Cir.), cert. denied, 488 U.S. 848 (1988) ("Rule 11 was designed to penalize abuse of district court process, not an improper submission to arbitration.").

Under Minn. Stat. §549.21, costs, disbursements, and reasonable attorney fees may be awarded against a party who acted in bad faith, asserted a claim or defense that is frivolous and costly to the other party, asserted an unfounded position solely to delay the ordinary course of proceedings or to harass, or committed a fraud upon the court. Minn. Stat. §549.21, subd. 2 (1988 & Supp. 1995). Requisite to an award of sanctions under the statute is a finding that counsel proceeded in bad faith. Uselman, 464 N.W.2d at 140. The existence of bad faith is an issue of fact to be determined by the trial court. Id.

Under both the rule and the statute, an attorney must have fair notice of both the possibility of a sanction and the reason for its proposed imposition. Uselman, 464 N.W.2d at 143. In addition, the attorney must be given the opportunity to respond to the notice of a possible sanction. Id. at 144. See also Martin v. Brown, 63 F.3d 1252 (3rd Cir. 1995) ("The fundamental requirements of due process--notice and opportunity to respond--must be afforded before any sanction is imposed; with regard to sanctions, particularized notice of the grounds for the sanction under consideration is generally required.").

The Court does not believe that an award of sanctions is appropriate in this case. Plaintiff failed to point to any "pleading, motion, or other paper" filed in violation of Rule 11 or the statute. The only papers to which Plaintiff refers are papers filed in the underlying arbitration, and this Court is without authority to sanction Defendants and their counsel for an improper submission to arbitration. Moreover, Plaintiff has

failed to convince the Court that Defendants and their counsel proceeded in bad faith in retaining Rush as their expert witness and in refusing to withdraw his name after Plaintiff objected.

As to this Court's October 13, 1995 Order, the language of the Court's order is specific in its prohibition: neither the specific award received nor the reasons for the Court's vacatur were to be disclosed to the new panel of arbitrators. Defendants and their counsel did not violate this order. Therefore, Plaintiff's motion for sanctions must be denied.

Based on the Court's decision herein, it does not need to determine the issue of whether Defendants and their counsel had adequate notice of the possibility of sanctions and an opportunity to respond as required by Uselman, 464 N.W.2d at 143, 144 and Martin v. Brown, 63 F.3d 1252 (3rd Cir. 1995).

III.

Motion to Strike Untimely Filings

Under Rule 115 of the General Rules of Practice for District Courts, Plaintiff's motion for sanctions and attorney fees was a non-dispositive motion. With regard to non-dispositive motions, Rule 115 clearly sets forth the time lines for filing and serving motion papers and response memoranda. If responsive papers are not properly served and filed in a non-dispositive motion, the court may deem the motion unopposed and grant the relief requested without a hearing. However, the court may, in its discretion, waive or modify the time limits established by the rule.

Plaintiff's attorney was given additional time to respond to Defendants' late filings, and, therefore, Plaintiff suffered no prejudice as a result of Defendants' delay. Plaintiff's motion to strike untimely filings is denied.

DFP

EXHIBIT H

CASE TYPE: MISREPRESENTATION/
DEFAMATION/CONTRACT

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn,

Court File No. CT94-015904

Claimant/Plaintiff,

v.

BRIAN HONN'S MEMORANDUM IN SUPPORT OF MOTION TO STAY PROCEEDINGS

R.J. Steichen and Company and John E. Feltl,

Respondents/Defendants.

Judge Pierce is presiding over court in the Southdale Courthouse today and is not available to hear this matter, which needs to be heard today, to avoid additional and unnecessary expenses, fees and costs to Plaintiff Brian Honn.

On January 20, 1995, Judge Delila F. Pierce of the Hennepin County District Court for the State of Minnesota granted the Plaintiff's Motion to Vacate the National Association of Securities Dealers, Inc. ("NASD") Arbitrators' Award. (Plaintiff Honn, a securities broker, is required to have all of his disputes with former employers arbitrated before the NASD.)

The primary basis for the Judge's decision was the fact that Craig Landauer, an NASD official, was allowed to testify on behalf of the Steichen Defendants as an expert witness. The Court found that Mr. Landauer, an NASD employee,

testifying as an expert on behalf of the Defendants in an NASD proceeding, where the NASD selects the arbitrators to hear a particular dispute, "presents at the very least, bias and prejudice."

The Court stated:

> Plaintiff Honn equates this to having one judge sitting in the courtroom, calling in a judge from the courtroom next door to provide some testimonial insight for the jury, while indicating that it is the defendants in the case which have called the judge to testify. The Court agrees.

The Court went on to state that allowing an NASD official to testify on behalf of Defendants placed Plaintiff at an extreme disadvantage before the arbitration panel. Admitting such testimony raised questions both as to the fairness of the proceeding and whether or not the NASD-appointed arbitrators would have a difficult time disagreeing with an NASD employee.

The Court also mentioned the fact that William R. Schief, an NASD Vice President in charge of Regional Attorneys/Enforcement, sent an official letter on behalf of the NASD to Rebecca E. Bender, counsel to Brian Honn. In that letter, Schief stated that the "NASD has a long-standing policy not to provide staff persons as so-called expert or technical witnesses in private litigation or in arbitration proceedings." Judge Pierce found that this letter made it clear that the NASD overstepped its own policies and rules, making it more obvious that allowing an NASD official to testify in the arbitration proceeding was unfair and thereby prejudiced the Plaintiff.

This decision by Judge Pierce was appealed by Steven E. Rau, counsel to the Steichen Defendants twice to the Minnesota Court of Appeals, once to the Minnesota Supreme

Court and once, pursuant to a petition of writ of certiorari, to the United States Supreme Court. Plaintiff Brian Honn is a struggling broker due to the defamation which is the primary claim he has been attempting to bring in an unprejudiced forum against his former employer, the brokerage firm R.J. Steichen and John E. Feltl, its principal. Mr. Honn's expenses and legal fees in responding to the numerous appeals by opposing counsel have amounted to in excess of $45,000, including over $5,000 solely in printing costs to oppose the Steichen Defendants' Petition for Writ of Certiorari to the United States Supreme Court.

Mr. Honn was anxious to proceed with a nonprejudiced hearing in this matter. Unfortunately, Steichen Defendants' counsel Mr. Rau moved to postpone the rehearing of the case in early October 1995 and included within his motion papers the outcome of the previous award to Mr. Honn, which was a minimal dollar amount, due to the above-referenced prejudice in the first hearing. Leaving aside issues of bad faith by the Steichen Defendants in attempting to advise the newly appointed panel of the fact of the previous award in a tainted proceeding, Bender, as counsel to Honn, challenged the panel for cause when the NASD provided this prejudicial material to the newly appointed panel.

The NASD denied the challenge for cause, requiring Honn to go back to Judge Pierce who had retained jurisdiction over this matter. Judge Pierce entered an order removing the tainted arbitrators for cause, ordering the appointment of a new panel, and advising the NASD, the Steichen Defendants and their counsel that any mention of the amount of the previous award or of the fact that an NASD official testified on behalf of the Steichen Defendants to any newly appointed panel, would result in sanctions being imposed

Mr. Honn, who is presently borrowing money to make his mortgage payment, does not have the finances to go through a prejudiced hearing and the subsequent appeals again.

Unfortunately, without this Court's intervention, this is exactly what is going to take place.

Steichen counsel Steven Rau advised Plaintiff Honn that he has added one additional witness to his witness list. That additional witness is Richard Rush, the former Assistant District Director of the NASD Kansas City Office. Mr. Rush left the NASD less than six months ago. Mr. Rush was the number two person, second only to the District Director, who had disciplinary authority over the Defendants R.J. Steichen and Company and its principals including Defendant John Feltl. District No. 4 of the NASD includes a number of states, one of which is the State of Minnesota where R.J. Steichen has its offices.

For Mr. Rush to testify on behalf of R.J. Steichen as an expert witness, when, during the time of the defamatory acts at issue he was responsible for disciplinary inquiries, investigations and actions brought against Defendant brokerage firm R.J. Steichen is to ensure a second prejudiced hearing. Thomas P. Moran, an attorney from the General Counsel's Office of the NASD, has today sent a letter to the Staff Attorney for the NASD, advising that staff attorney that as former NASD employees may testify in the upcoming arbitration, the NASD wishes that it "be made clear to the arbitrators that these ex-employees are testifying in their personal capacities, not on behalf of the NASD and do so without the approval or disapproval of the Association." (Underlining supplied.) In other words, though Mr. Rush had direct disciplinary oversight over R.J. Steichen less than six months ago, and though his "NASD cloak" is still warm, he will be testifying for the Steichen Defendants. Whatever the NASD's Mr. Moran says is irrelevant.

It is not difficult to imagine the questions which will be posed by Steichen's counsel to their recently retired NASD official with Steichen oversight powers:

Q: What was your title and what were the responsibilities which you had through your work at the NASD?

A I left the NASD on May 31, 1995, having acted as the Assistant District Director of that office, charged with monitoring and coordinating main and branch office field inspection of brokerage firms within District No. 4.

Q: Is R.J. Steichen a firm within District No. 4?

A: Yes.

Q: But Mr. Rush, you are solely testifying here as an expert, aren't you, and are not testifying concerning facts you learned while regulating brokerage firms including R.J. Steichen?

A: Of course, I am solely testifying as an expert witness on behalf of R.J. Steichen.

It is clear that no matter what Mr. Rush says, the logical impression left with these arbitrators will be that Mr. Rush, a recently retired NASD official, found nothing wrong with Steichen's conduct during the time he was charged with overseeing Steichen's compliance with NASD rules and regulations. Otherwise, Mr. Rush would not be testifying on behalf of R.J. Steichen.

Simply put, Mr. Rush is not just an expert witness. Mr. Rush is a combined fact and expert witness. Mr. Rush, with the assistance of the NASD, is again going to use the NASD's name to help a member fee-paying firm, R.J. Steichen.

Plaintiff's counsel served a subpoena upon the NASD seeking, inter alia, documents evidencing the connection

between Mr. Rush and R.J. Steichen during the time that this action was being brought previously and during the time when the acts by the Defendants occurred. Though the NASD provided some documents relating to other issues, the NASD has refused to provide documents to Plaintiff which would demonstrate Mr. Rush's close connection to R.J. Steichen.

The NASD is thereby assisting Mr. Rush and its fee paying member, R.J. Steichen, by using its privilege as a sword and a shield. Mr. Rush, the recently retired NASD Assistant Director can, with his sword, testify against Mr. Honn's claims of defamation. The NASD will then hold up its shield to protect Mr. Rush and itself from producing documents showing all of the wrongdoing which has taken place at Steichen during the time period Mr. Rush, on behalf of the NASD, was regulating the firm. Mr. Rush will be "blessing" Steichen and its activities as soon as he takes the stand.

The NASD's Thomas Moran, advises the NASD staff attorney to bring up the issues in this subpoena with the panel. As soon as the NASD-appointed arbitrators, sitting in an NASD forum, are advised of the fact that the NASD is refusing to produce documents requested by Plaintiff, or the fact that an NASD official who had oversight responsibilities over R.J. Steichen up to six months ago is testifying for that firm, there will be again a prejudiced hearing for Mr. Honn.

Mr. Honn intends to file a complaint next week against the NASD, as Mr. Honn is required to have all his disputes arbitrated before the NASD and the NASD has demonstrated, now three times, that it is unable to provide him with an unprejudiced hearing.

Mr. Honn is seeking a stay of this arbitration proceeding so that he may sue the NASD and not be required to incur additional expenses, fees and costs. Steven Rau, Steichen's counsel, had previously asked the NASD for this hearing to be postponed. Now that Mr. Honn also wants the hearing

postponed, Mr. Rau, today, has refused to stipulate to a postponement.

Dated: November 2, 1995

/s/

Rebecca E. Bender, Esq.
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR
CLAIMANT/PLAINTIFF
BRIAN L. HONN

EXHIBIT I

REBECCA E. BENDER & ASSOCIATES, P.A.

Minnesota Law Center
514 Nicollet Mall • Suite 570
Minneapolis, Minnesota 55402-1021

Telephone (612) 332-6220
Facsimile (612) 332-4728

January 15, 1996

VIA MESSENGER (on January 16, 1996 due to Martin Luther King Day)

District Court Administrator
Hennepin County District Court
Hennepin County Government Center
Minneapolis, MN 55487

Re: Honn v. Steichen, et al.
Court File No. CT94-015904

Dear Sir or Madam:

On December 31, 1995, Mr. Steven Rau, counsel to the Defendants in the above-referenced matter filed a Notice of Motion and Motion to Compel Arbitration and for Sanctions, Memorandum in Support thereof and Affidavit of Steven Rau. The information contained in these "moving papers" is merely a restatement of information contained within the papers already filed by Mr. Rau on his clients' behalves, in opposition to the November 7, 1995 Motion of Plaintiff Brian Honn for Sanctions. (Mr. Rau filed two or three additional documents with the Court and Clerk after that hearing and Plaintiff Honn

responded to these papers). The "motion papers" filed by Mr. Rau are merely another set of responsive documents to the Motion for Sanctions filed by Mr. Honn; to delay this Court's ruling on the November motion and to have the last word.

Mr. Rau is attempting to continue what has been his pattern in this case, namely to delay rulings and to increase the costs of Mr. Honn's litigation. Mr. Honn does not believe it necessary to rehash the arguments with which this Court is well aware, e.g., 1) even brokers are not required to arbitrate disputes in forums which have been and continue to be prejudicial to them, (despite their being required to sign arbitration agreements in order to act as a broker in the securities industry), 2) Plaintiff Honn did not seek this Court's intervention to avoid the testimony of Richard Rush, but rather, to avoid the time and expense which would be incurred in his having a second hearing in a forum which was prejudiced against him, 3) Honn's subpoena to the NASD was not an ex parte subpoena, no matter how many times Mr. Rau claims it was, and 4) Mr. Honn still intends to file suit against the NASD due to its inability to provide him with a fair, non-prejudiced and nonbiased forum in his case, as soon as his counsel has the opportunity to finalize the complaint. (Since early December 1995, Plaintiff Honn's counsel Bender has acted as counsel to other parties in three unrelated securities arbitration trials and has three additional arbitration trials coming up in the next month).

Finally, in Plaintiff Honn's last Reply Memorandum submitted to this Court, Rebecca Bender, counsel to Honn, indicated that she was not available for the scheduled hearing in this matter on January 29, 1996, a date selected by Mr. Rau without consulting with Bender. In that Memorandum, Bender listed other dates when she would be available. However, Mr. Rau failed to reschedule his clients' motion for

any of those dates. Plaintiff Honn respectfully requests that this Court set this matter for hearing, if it so desires, for a date when both counsel are available, as Mr. Rau has ignored Ms. Bender's request of over a month ago, to reschedule his motion.

Very truly ours,

/s/
Rebecca E. Bender

REB/jm

cc: Judge Delila F. Pierce
Steven Rau, Esq.

EXHIBIT J

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Brian L. Honn, CASE TYPE: MISREPRESENTATION/ DEFAMATION/CONTRACT

Claimant/Plaintiff,

v.

PLAINTIFF/APPELLANT'S NOTICE OF APPEAL TO COURT OF APPEALS

R.J. Steichen and Company and John E. Feltl,

TRIAL COURT CASE NUMBER: CT94-015904

Respondents/Defendants.

DATE OF ORDER: APRIL 11, 1996, AMENDED APRIL 16, 1996 (FIRST ORDER SERVED ON APRIL 15, 1996)

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, Minnesota 55155

Please take notice that the above-named Plaintiff appeals to the Court of Appeals of the State of Minnesota from orders of the Court filed on the dates shown, lifting the Court's previous stay of the National Association of Securities Dealers, Inc. ("NASD") arbitration in the above-captioned matter and compelling arbitration.

Attorney for Defendants - Steven E. Rau, 701 Fourth Avenue South, Suite 500, Minneapolis, Minnesota 55415, (612) 399-0299.

Dated: May 15, 1996

/s/

Rebecca E. Bender, Esq., #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR
PLAINTIFF/APPELLANT
BRIAN L. HONN

EXHIBIT K

STATE OF MINNESOTA
IN COURT OF APPEALS

Brian L. Honn,

Appellant,

v.

R.J. Steichen & Company and John E. Feltl,

RespondentS.

Trial Court No. CT94-015904

Appellate Court No.

STATEMENT OF THE CASE OF APPELLANT BRIAN HONN

1. **Court or agency of case origination and name of judge or hearing officer who presided.**

Judge Delila Pierce of the Hennepin County District Court for the State of Minnesota issued the April 11, 1996 Order and April 16, 1996 Amended Order which form the bases for this appeal.

2. **Jurisdictional statement.**

This appeal is from the portion of the April 11, 1996 Order of Judge Pierce which served to dissolve an injunction or lift the stay previously imposed by Judge Pierce of the National Association of Securities Dealers, Inc. ("NASD") arbitration proceeding in this matter. The April 16, 1996

Amended Order solely corrected a typographical error in the April 11, 1996 Order.

On April 15, 1996, a copy of the April 11, 1996 Order of Judge Pierce was served via messenger upon counsel to Appellant by counsel to Respondents. The Notice of Appeal and accompanying documents are being filed and served on May 15, 1996.

This appeal is taken pursuant to Rule 103.03, as it is taken from an order which dissolves an injunction, lifting a court ordered stay of arbitration proceedings and compelling arbitration.

3. **State type of litigation and designate any statutes at issue.**

Arbitration/jurisdictional question/constitutional law/anti-trust litigation. The jurisdiction of the United States District Court for the District of Minnesota was invoked on February 28, 1996, pursuant to 28 U.S.C. § 1331, 28 U.S.C. § 1332 and under the doctrine of pendent jurisdiction. The Honn v. National Association of Securities Dealers, Inc. and Securities and Exchange Commission federal court proceeding is Federal Court File No. 3-96-182. That action was brought pursuant to the Fifth Amendment of the Constitution of the United States, pursuant to 15 U.S.C. §§ 1 and 2, and pursuant to various state and common law theories. This federal court action was filed prior to Hennepin County Judge Pierce hearing argument on Steichen's Motion to Lift the Stay. Judge Pierce was advised of the pending federal court action prior to the hearing on this matter.

4. **Brief description of claims, defenses, issues litigated and result below.**

Plaintiff/Appellant Brian Honn brought an arbitration proceeding against his former employer R.J. Steichen and its President John Feltl. Following the conclusion of that arbitration proceeding in an NASD forum, Brian Honn brought a Motion to Vacate the Arbitration Award, due, primarily, to the prejudice and bias in that proceeding. Hennepin County Court Judge Delila Pierce granted the Motion to Vacate, finding that Mr. Honn was denied a non-prejudiced, non-biased hearing.

After other problems with the NASD forum, on November 2, 1995, Judge Delila Pierce issued an Order, stating in relevant part:

> That [as] similar issues to those which required the vacatur previously are now present again, this Court is hereby ordering that the rehearing of the arbitration be and hereby <u>is stayed pending the resolution of Plaintiff Honn's litigation against the NASD</u>, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and non-prejudiced hearing.

(Emphasis added.)

In response to a subsequent motion for sanctions brought by Plaintiff Honn against the R.J. Steichen Respondents and their counsel, the Court, disagreeing with Steichen's challenge to its jurisdiction stated:

> . . . Once the Court's general equity jurisdiction has been invoked, it may stay an arbitration proceeding on the ground of bias or prejudice. To permit arbitration to proceed under such circumstances would be futile since the award would almost

certainly be vacated. Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (1989). See generally 4 Am. Jur. 2d, Alternative Dispute Resolution § 165 (1995).

This Court has not been asked to decide the merits of Plaintiff's employment and defamation claims against Defendants. The Court has been asked to stay an arbitration proceeding in a forum which has previously been found, by this Court, to be prejudicial to him and which, in all likelihood, based upon the facts presented to the Court, will be again. The Court was acting within its authority when it granted Plaintiff's motion to stay the rehearing of arbitration . . . .

On December 31, 1995, Respondents filed their Memorandum in Support of Motion to Compel Arbitration and for sanctions. On February 28, 1996, Claimant Honn filed an affidavit with the Court, which notified the Court of litigation which had been commenced against the NASD and the Securities and Exchange Commission on federal constitutional, federal antitrust and other theories, due to Mr. Honn's inability to receive a non-prejudiced hearing of his claims.

Despite the dates set forth in this Court's Order and the Court's Amended Order, the hearing in this matter which resulted in the April 11 and April 15, 1996 Orders, took place on Monday, March 4, 1996, not on January 29, 1996.

On April 11, 1996, the District Court lifted its previously imposed stay of the arbitration proceeding, granting the Steichen Defendants' Motion to Compel Arbitration.

5. **Issues proposed to be raised on appeal.**

a. Whether the state court has jurisdiction to lift a stay of the arbitration proceedings in an NASD forum once the NASD has been named as a party in a federal court action, based upon the same set of facts the state court was reviewing.

b. Whether the state court is allowed to "preempt" the decision of a jury in a federal court action alleging violations of the United States Constitution and violations of federal antitrust law against the NASD and the Securities and Exchange commission, prior to Plaintiff Brian Honn having an opportunity to present his claims to a jury.

c. Whether the state court's cite to the case of Amdahl v. Green Giant Company, 497 N.W.2d 319, 322 (Minn. Ct. App. 1993), is grounds for lifting its stay in this matter when that case does not deal with any issues of a prejudicial forum as in the case at bar.

d. Whether the Court can lift its own stay when the language of its stay provided specifically that the rehearing of the arbitration was "stayed pending the resolution of Plaintiff Honn's litigation against the NASD," and that litigation is still pending.

6. **Is transcript required?**

Not applicable, as the Court did not make a record of the March 4, 1996 hearing.

7. **Is oral argument requested?**

Yes.

If so, is argument requested as a location other than that provided in Rule 134.09, subd. 2?

No.

8. **Are formal briefs necessary?**

Yes.

9. **Names, addresses, zip codes and telephone numbers of attorney for Appellant and Respondent.**

Counsel for Appellant:

Rebecca E. Bender
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220
Attorney Reg. No. #139075

Counsel for Respondents:

Steven E. Rau
701 Fourth Avenue South
Suite 500
Minneapolis, Minnesota 55415
(612) 399-0299
Attorney Reg. No. 147990

Dated: May 15, 1996

/s/

Rebecca E. Bender, Esq., #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR APPELLANT
BRIAN L. HONN

EXHIBIT L

STATE OF MINNESOTA
IN COURT OF APPEALS

Brian L. Honn,

Appellant,

v.

R.J. Steichen & Company and John E. Feltl,

Respondents

Trial Court No. CT94-015904

Appellate Court No. C5-96-980

APPELLANT'S NOTICE OF MOTION AND MOTION FOR PERMISSION TO FILE PETITION FOR DISCRETIONARY REVIEW

TO: Clerk of the Appellate Court, Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, Minnesota 55155 and All Counsel of Record

PLEASE TAKE NOTICE that Appellant Brian L. Honn, having been served with Respondents' Motion to Dismiss for Lack of Jurisdiction, hereby moves the Court of Appeals to allow him to file a petition for discretionary review, should the Court find that it lacks jurisdiction, despite the fact that the trial court went beyond compelling arbitration in accordance with this Court's decision in Eckblad v. Farm Bureau Mutual Insurance Company, 371 N.W.2d 78 (Minn. Ct. App. 1985), pet. for rev. denied (Minn. Sept. 26, 1985).

This Notice of Motion and motion is based upon the Memorandum of Law in support of this motion, the Memorandum in opposition to Respondents' Motion to Dismiss for Lack of Jurisdiction, and Affidavit of Rebecca E. Bender with attachments.

Dated: May 24, 1996

s/s

Rebecca E. Bender, Esq., #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR APPELLANT
BRIAN L. HONN

EXHIBIT M

STATE OF MINNESOTA
IN COURT OF APPEALS

Trial Court No. CT94-015904

Brian L. Honn,

Appellate Court No. C5-96-980

Appellant,

v.

R.J. Steichen & Company and John E. Feltl,

Respondents.

APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION TO FILE PETITION FOR DISCRETIONARY REVIEW, SHOULD THIS COURT DETERMINE THAT IT LACKS JURISDICTION TO HEAR THE DIRECT APPEAL OF THIS MATTER

As set forth in Honn's Memorandum in Opposition to Respondents' Motion to Dismiss for Lack of Jurisdiction, as the state court in this action went beyond compelling arbitration, but also lifted a previously imposed (November 2, 1996) stay of arbitration due to the prejudiced National Association of Securities Dealers, Inc. ("NASD") forum, thereby determining at the state level exclusive federal court jurisdiction claims, Honn believes he has a right to appeal this matter directly pursuant to Minn. Stat. § 103.03.

Following Mr. Honn's filing and service of his Notice of Appeal and Appeal, Respondents filed a Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction. Should this Court determine that it lacks jurisdiction,

Appellant Honn is able to establish a compelling reason for review of the State Court's Order, as he would be irreparably damaged due to the potential collateral estoppel effect of the state court's determination of his exclusively federal court claims. See Mivoa v. Gold Bond Stamp Company Employees Retirement Trust, 196 N.W.2d 309 (1972).

As Honn did not believe that this Court lacked jurisdiction to hear this appeal directly, and still does not, he did not file a Petition for Discretionary Review. Eckblad v. Farm Bureau Mut. Ins. Co., 371 N.W.2d 78 (Minn. App. 1985). Should this Court make the determination that it lacks jurisdiction, Honn respectfully requests that he be allowed to file a Petition for Discretionary Review, though the time period for filing such a petition has officially passed.

Dated: May 24, 1996

s/s

Rebecca E. Bender, Esq., #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR APPELLANT
BRIAN L. HONN

EXHIBIT N

STATE OF MINNESOTA
IN COURT OF APPEALS

Brian L. Honn,

Appellant,

v.

R.J. Steichen & Company and John E. Feltl,

Respondents.

Trial Court No. CT94-015904

Appellate Court No. C5-96-980

APPELLANT'S MEMORANDUM IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS FOR LACK OF JURISDICTION

I. INTRODUCTION

The procedural history of the three attempts by Appellant Honn to have his arbitration claims heard in a non-prejudiced, nonbiased forum is a lengthy one which consumes 15 pages (pages 4 through 19) in the Complaint filed by Plaintiff Brian Honn in the United States District Court for the District of Minnesota. (Complaint attached as Exhibit A to Bender Affidavit included herewith.) Simply put, the case at bar raises issues which are far more complex than and which are clearly distinct from the issues raised in the cases cited by Respondents in their memorandum, attempting to dismiss this appeal for lack of jurisdiction.

This matter does not simply require an analysis of which orders are appealable in arbitration proceedings pursuant to Minn. Stat. § 572.26. The portion of the District Court's Order compelling arbitration is only a portion of the Court's April 1996 orders, which is a follow-up to the Court's November 2, 1995 Order. The primary question presented to this Court is whether, in lifting a stay, the State District Court may determine a federal question over which the federal courts have exclusive jurisdiction in a pending federal court action. To examine the Court's April 11, 1996 Order as solely compelling arbitration is to ignore the Court's previous orders and the pending federal court action. It would not be logical to have Mr. Honn proceeding in an NASD Arbitration at the same time a federal court is deciding whether the NASD and SEC, generally, have in the past, and continue to provide Mr. Honn with a prejudiced forum, thereby denying his constitutional and other rights.

When the Steichen Respondents sought the review of this Court in 1995, they were seeking to have this Court review an Order of District Court Judge Pierce, which simply granted Mr. Honn's Motion to Vacate the National Association of Securities Dealers, Inc.'s Arbitration Award and concurrent therewith compelled the rearbitration of this matter under certain conditions. Clearly, this Court was correct in questioning jurisdiction at that time in light of Minn. Stat. § 572.26, subd. 1(5) (1994).

The posture of the case which is now presented to this Court is substantially different.

II. ARGUMENT

There are typically only two times when a court compels arbitration. First, a court may compel arbitration when there is an issue as to whether a court or an arbitration forum should properly hear a case. These determinations, which direct a

case to arbitration are clearly not appealable pursuant to Minnesota Statutes. The second type of situation is one in which a Motion to Vacate is brought due to some impropriety in the arbitration proceedings. If a court, as District Court Judge Pierce did in 1995, not only vacates the award but also directs that the case be resubmitted to a new arbitration panel, Minnesota Statutes also do not allow an appeal from such a determination.

The case at bar is significantly different, as the court was lifting an injunction (a stay) , which the court had previously imposed on November 2, 1995. Pursuant to Minn. Stat. § 103.03, when a court is lifting an injunction, such an order is immediately appealable.

The April 11 and 16, 1996 Orders of Judge Pierce were the second portion of the Court's November 2, 1995 Order. That Order provides:

> On November 2, 1995, Rebecca E. Bender, counsel to Plaintiff Brian L. Honn brought an expedited ex parte motion to stay the rehearing of an arbitration which was previously vacated by this Court. As it appears to this Court that similar issues to those which required the vacatur previously are now present again, this court is hereby ordering that the rehearing of the arbitration be and hereby is stayed pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and non-prejudiced hearing. It is so ordered.

(Underlining supplied.) (The November 2, 1995 and April 11, 1996 orders are attached with the Court's other Orders as Exhibit B to the Bender Affidavit.)

In the present case, there are clearly issues, not addressed by Respondents, which require this Court's intervention. As

set forth in Appellant Honn's Notice of Appeal, District Court Judge Pierce had previously instituted a stay of the arbitration proceedings pending the outcome of Mr. Honn's litigation against the National Association of Securities Dealers, Inc. Though that litigation is still pending, the Court subsequently lifted its stay. As Mr. Honn has alleged constitutional and antitrust claims against the National Association of Securities Dealers, Inc. and the Securities and Exchange Commission, for the State District Court to now lift the stay of arbitration would be for the state court to decide an issue which Mr. Honn may properly only have decided by a federal court and jury, as federal courts have exclusive jurisdiction over antitrust and federal constitutional law claims.

Mr. Honn has a compelling reason for review of his order, as he would be exposed to irreparable damage should the state court in effect determine Mr. Honn's exclusively federal claims, prior to a federal court or jury having the opportunity to do the same.

Should this Court make a determination that it lacks jurisdiction in this matter, Appellant Honn is, concurrently herewith, moving the Court for the ability to file a petition for discretionary review.

The case at bar is more akin to the decision in Eckblad v. Farm Bureau Mutual Insurance Company, 371 N.W.2d 78, 80 (Minn. Ct. App. 1985), pet. for rev. denied (Minn. Sept. 26, 1985), than to cases cited by Respondents. In Eckblad, the court determined the parties' rights, in addition to compelling arbitration. This is exactly the situation in the case at bar, where the ultimate question in the federal court action, namely, whether Mr. Honn's rights to a non-prejudiced hearing have been and are continuing to be undermined, is the very issue which Judge Pierce is now deciding, in conjunction with her Order compelling arbitration.

Mr. Honn is entitled to have his federal claims determined in federal court. Though the District Court was aware of the

fact that the Federal Court Complaint had been filed, through a filed affidavit of Honn's counsel, the State Court nonetheless lifted the stay, made findings concerning Mr. Honn's ability to have a nonprejudiced hearing and compelled arbitration, thereby making a state court determination of federal claims.

For additional guidance, the case of Kanevsky v. National Council of Knights, 157 N.W. 646 (Minn. 1916) is helpful. There, the Minnesota Supreme Court examined whether an order denying a stay of proceedings was simply that. The reviewing court found that the district court order was appealable as a matter of right, where it denied defendant's motion for an order enjoining plaintiffs from proceeding with certain litigation until a related equity suit was determined. In the instant action, the District Court's April 1996 orders in detailed findings were, in addition to compelling arbitration, also:

1) not allowing a pending federal action to take priority;
2) not allowing a federal court/jury to determine Honn's exclusively federal claims;
3) dissolving an injunction she had imposed against proceeding in an arbitration; and
4) determining, implicitly, that the NASD was somehow no longer a prejudiced forum to Honn, the Court's Order is clearly appealable.

To look at the District Court's Order as merely an order to compel arbitration is to argue form over substance, to ignore the Court's other findings, and to ignore the procedural history of this case.

Dated: May 24, 1996

s/s

Rebecca E. Bender, Esq., #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR APPELLANT
BRIAN L. HONN

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
)ss.
COUNTY OF HENNEPIN)

Rebecca E. Bender, in the County of Hennepin, State of Minnesota, being first duly sworn upon oath, states that on the 24th day of May, 1996, she served a copy of Appellant Honn's Memorandum in opposition to Respondents' Motion to Dismiss for Lack of Jurisdiction, Notice of Motion and Motion to Allow Filing of Petition for Discretionary Review and Memorandum in support thereof and Affidavit of Rebecca E. Bender with attachments, upon counsel of record in this matter, by mailing a copy thereof in the United States mail, postage prepaid, as follows:

Steven E. Rau, Esq.
Rau and Floyd
701 Fourth Avenue South
Suite 500
Minneapolis, Minnesota 55415

s/s
Rebecca E. Bender

Subscribed and sworn to
before me this 24th day
of May, 1996.

s/Sheila M. Holm
Notary Public

EXHIBIT O

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

BRIAN L. HONN, Plaintiff,	)	
vs.	)	COURT FILE NO. 3-96-182
NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., and SECURITIES AND EXCHANGE COMMISSION, Defendants.	)	

The above-entitled matter came duly on for hearing before Magistrate Judge John M. Mason on the 7th day of June 1996 in the City of St. Paul, State of Minnesota.

COPY

Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

ROBIN M. RITSCHE, RPR
620 PLYMOUTH BUILDING
MINNEAPOLIS, MINNESOTA 55402
(612) 341-2122

RAY J. LERSCHEN & ASSOCIATES

COUNSEL ON BEHALF OF PLAINTIFF BRIAN HONN:

REBECCA E. BENDER, ESQ.
Rebecca E. Bender and Associates, P.A.
514 Nicollet Mall
Suite 570
Minneapolis, Minnesota 55402

COUNSEL ON BEHALF OF DEFENDANT NASD:

TERRI L. REICHER, ESQ.
NASD, Inc.
Office of General Counsel
1735 K Street, N.W.
Washington, D.C. 20006

ERIKA KOSTER, ESQ.
Local Counsel for NASD, Inc.
Oppenheimer, Wolff & Donnelly
3400 Plaza VII
Minneapolis, Minnesota 55402

COUNSEL ON BEHALF OF DEFENDANT SEC:

LAURA S. PRUITT
Senior Counsel - Office of General Counsel
Stop 6-6
450 Fifth Street, Northwest
Washington, D.C. 20549

Also Present: Plaintiff Brian Honn.

* * * * *

• • •

Ms. Masuchi has no way of changing the policies of the non-arbitration arm of the NASD.

So once again, Mr. Honn has truly exhausted his remedies here, and the Court, last night I was trying to determine what questions the Court may be interested in and the last one that I thought of is well, now that Mr. Rush is not testifying aren't Mr. Honn's problems over, isn't that what basically Judge Pierce said. And Your Honor, it's our position that Mr. Honn has a right to have a tryor of fact determine whether the NASD has violated and continues to violate his due process rights, whether the SEC has acted properly under the Administrative Procedures Act, whether there has been a Federal Tort Claim against the United States government that can be proven. These are not issues we respectfully state to be decided on a motion to dismiss. Mr. Honn has been damaged in the past through the non-arbitration arm of the NASD and he continues to be damaged. As in light of the manner in which the NASD has chosen to interpret its rules Mr. Honn can still not be provided with what he and I thought was a basic right in these arbitrations that I'm involved in many in a month.

With all due respect to Judge Pierce, as we've stated, it's not up to her to decide federal questions once they're the subject of a federal court claim in this court which entitles Mr. Honn to a jury trial. The standard, as this Court is aware, has Mr. Honn stated a claim upon which relief can be granted, it will be up to a jury whether Mr. Honn has been and continues to be damaged. Certainly the standard for bringing claims against the NASD is not either exhaustion of remedies, exhaustion of finances or exhaustion of spirit. Thank you, Your Honor.

THE COURT: In the complaint your prayer for relief is, the first prayer is that Mr. Honn recovered damages due to

his not being able to have a non-prejudiced hearing on his claims. Help me with the procedural history. As I understand it there was an arbitration proceeding and it was found in that proceeding that R.J. Steichen and John Feltow had defamed Mr. Honn and that he was damaged and that the amount of the damages was $7300.

MS. BENDER: May I correct the record on that?

THE COURT: Sure.

MS. BENDER: The panel found that there was no defamation after Mr. Landauer's testimony. Those sums that were awarded were based on other employment related claims that Mr. Honn had raised.

THE COURT: Okay, so the award was thrown out because the district court of Minnesota found that the panel was biased. There was lengthy period of appeal and then a lengthy period seeking independent panel. And as of April 11 of 1996 it has been determined that an independent panel is available. And that's what this district court of Minnesota found.

MS. BENDER: If I may, Your Honor, what Judge Pierce found was that based upon the fact that Mr. Rush was no longer testifying she intended to lift the stay and compel arbitration.

THE COURT: Right, that reversed her earlier order in which she had stayed arbitration because an independent panel couldn't be assured.

MS. BENDER: Your Honor, I once again beg to differ with that assessment. It was her concern previously, and the orders speak better than I probably do restating them, but it was her concern previously that Mr. Rush's testimony specifically, and the fact that Mr. Honn had, in the November 2 order there's a specific reference to the fact that Mr. Honn is intending to bring his claims against the NASD, because of those two issues she indicated that before that she was staying the arbitration. In her order of April she only refers to Mr.

Rush's testimony and did not make reference to the NASD or Mr. Honn's claims against the NASD.

THE COURT: So the way things stand now Mr. Honn will be entitled to a hearing. The district court of Minnesota has not granted the relief he requested to stay that hearing among the grounds, on any of the grounds that you've asserted.

MS. BENDER: Well, Your Honor, it was actually a motion that was brought by R.J. Steichen's counsel to lift the stay due to the fact that Mr. Rush in the interim had made the decision to no longer testify.

THE COURT: So the district court of Minnesota has ordered that arbitration go forward?

MS. BENDER: Correct, that's what the last order from the court is, which is now being appealed in light of the fact that we have federal questions at issue here.

THE COURT: And if it is determined that there is not a reason for the arbitration to be stayed, and that the district court's order should be forward, then Mr. Honn will have a hearing, right?

MS. BENDER: Mr. Honn would have a hearing if the court of appeals does not rule that Judge Pierce's order should be stayed in essence while this proceeding proceeds.

THE COURT: Well, that's not what I asked.

MS. BENDER: I'm sorry.

THE COURT: I simply asked you whether if Judge Pierce's order is sustained on appeal there won't be a hearing and it will be before a non-biased panel?

MS. BENDER: Your Honor, I believe that there would be a hearing, but I certainly would not believe it's going to be a non-biased panel.

THE COURT: But that's what Judge Pierce found.

MS. BENDER: It's my understanding that what Judge Pierce found was that due to the fact that Mr. Rush was no longer testifying that the case could proceed to arbitration

THE COURT: Is there any basis for concluding anything other than that Judge Pierce concluded that the panel would be non-biased?

Ms. BENDER: Your Honor, I believe that Judge Pierce was required to deal with the facts that she had in front of her and based upon those facts, which were not all of the facts that this Court is being apprised of, she made her determination in accordance with the way you just explained it.

THE COURT: The answer to my question is no, right? There's no basis upon which to conclude that the district court of Minnesota ordered a hearing that the court knew to be a biased hearing?

MS. BENDER: Your Honor, I don't think that was Judge Pierce's intention.

THE COURT: Judge Pierce, it would be fair to conclude, wouldn't it, concluded that arbitration should be ordered because under the circumstances she was persuaded that that would not be a biased hearing.

MS. BENDER: Your Honor, the role of the reviewing court in arbitration is very limited, and it's my understanding that what Judge Pierce was saying was that she no longer had the ability to not compel arbitration in the face of a pending motion to compell.

THE COURT: Sure, and that if the arbitration is held and it turns out the hearing was biased you have a remedy.

MS. BENDER: For a third time, and as I said, I don't believe that either the Malone Act or the Administrative Procedures Act or Federal Tort Claims Act, or any of the claims we've raised against the NASD envision such an exhaustion of finances, spirit and remedies. It's our position we've exhausted the remedies numerous times and that it seems to be an ongoing problem that needs to be addressed with court intervention.

THE COURT: Well, as you can tell from the questions I'm asking you, it appears to this court, and I want to give you an opportunity to give me your point of view on that, but at least on the review that I've had to date it appears that the relief that your client seeks has in effect been granted. There is going to be a non-biased hearing and he'll be entitled to express his claim for damages in that non-biased hearing. If he's entitled to damages and if he's entitled to his cost in attorneys fees in getting to that point there's a tribunal available to him, and there's nothing for this court to decide.

MS. BENDER: Well, Your Honor, the tribunal does not have jurisdiction over the NASD or the SEC. They are not parties there. When it is the actions of the NASD and the SEC that have cost him and have continued to cost him and damaged him, the NASD arbitration panel has no jurisdiction to bring in the NASD and SEC into those proceedings.

THE COURT: But the damages caused by the NASD and the SEC as I understand it consists of the testimony being offered by this NASD official and the failure of the SEC to adopt a rule. Those are the actions that you're challenging if you cut through all the rhetoric.

MS. BENDER: Well, Your Honor, there's also the issue of not providing documents in response to a subpoena with respect to Mr. Rush.

THE COURT: All right, those three items?

MS. BENDER: Primarily, correct.

THE COURT: All right. Anything else?

MS. BENDER: No, Your Honor.

THE COURT: All right, Ms. Reicher, do you wish to respond, very briefly?

MS. REICHER: Yes, Your Honor. I'm only bringing up one page. It will be very brief.

THE COURT: Okay.

MS. REICHER: Your Honor, what has become

* * * * *

in it. I'm going to give each of you, I'm going to require that each counsel and their client submit to this court by June 21 a letter advising the Court as to whether any of the claims or defenses that are being asserted are desired to be withdrawn. And that should be signed by the attorney and the client. And the Court views the responsibility of the attorneys and their clients under Rule 11 very seriously, and there's also provision in 28 U.S.C. Section 1927 to which I call the parties' attention.

And so by June 21 each party shall, prior to June 21 each party shall, having in mind all of the argument that has been made now and the exchange of briefs, there is ample opportunity for the parties to decide whether to persist in any of their claims or defenses. And/or whether any of those on reflection should be withdrawn. And so I'll require that by the 21st of June.

Meanwhile I see no reason whatsoever why the arbitration proceedings should not go forward. Nothing that this Court is going to do will affect that. That is a decision committed to the state district court and the state district court has already ruled on that. This Court expressly declined to take any action which would delay that proceeding and believes that that is committed solely and exclusively to the state district court. There's no basis for this Court to conclude that the arbitration proceeding would not be fair, or that if it's not fair that the state district court isn't within the power to make sure that it is fair. It's confident that the district court would not have ordered arbitration if it were thought that the arbitration would be not fair, because it's clear that the district court or the state, whether it was concerned about the fairness of the arbitration proceeding, did not order that it proceed. Given the order of the district court at this time it is clear that the district court of the state has thought about it and concluded the arbitration should go forward that there is not

unfairness if it goes forward, so nothing that this Court intends to do or will do is going to affect that. We're in recess.

(Whereupon, court was recessed at 11:10 a.m.)

* * * * *

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

REPORTER'S CERTIFICATE

BE IT KNOWN THAT I, Robin M. Ritsche, the undersigned, a duly commissioned and qualified notary public within and for the County and State aforesaid, do hereby certify that the above and foregoing transcript, consisting of the preceding 71 pages, is a correct transcript of my stenographic notes and is a full, true and complete transcirpt of the proceedings to the best of my ability.

WITNESS MY HAND AND SEAL this _____ day of _____, 1996.

_____

ROBIN M. RITSCHE
Notary Public, Hennepin County, Minnesota.
My commission expires January 31, 2000.

EXHIBIT P

STATE OF MINNESOTA

IN COURT OF APPEALS

Brian L. Honn,

Appellant, ORDER

vs. C5-96-980

R. J. Steichen and Company,
et al.,

Respondents.

Considered and decided by Toussaint, Chief Judge, Huspeni, Judge, and Peterson, Judge.

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND FOR THE FOLLOWING REASONS:

This appeal was filed May 15, 1996. Appellant seeks review of an April 11, 1996, order and an April 16, 1996, amended order lifting a stay of the arbitration proceeding and granting respondents' motion to compel arbitration. This court questioned jurisdiction, and respondents moved to dismiss the appeal as taken from nonappealable orders. Appellant opposes the motion and filed an alternative motion for discretionary review.

The April 11, 1996, order is not appealable under Minn. R. Civ. App. P. 103.03(b) because there is no indication

appellant sought injunctive relief and the order does not address the factors pertaining to the grant or denial of a temporary injunction. *See* Minn. R. Civ. P. 65; *Dahlberg Bros. v. Ford Motor Co.*, 272 Minn. 264, 274-75, 137 N.W.2d 314, 321-22 (1965).

The April 11, 1996, order is not appealable under Minn. Stat. § 572.26, subd. 1 (1994). *See Miyoi v. Gold Bond Stamp Co. Employees Retirement Trust*, 293 Minn. 376, 378, 196 N.W.2d 309, 310 (1972) (order denying stay of arbitration sought under the Uniform Arbitration Act is not appealable); *AFSCME Council 14 v. St. Paul Ramsey Hosp.*, 425 N.W.2d 318, 319 (Minn. App. 1988) (order compelling arbitration is not appealable because it is not a final order). Because the April 11, 1996, order does not determine the merits of the claims in the arbitration proceeding, it is not appealable as a judgment in a declaratory judgment action. *Cf. Eckblad v. Farm Bureau Mut. Ins.*, 371 N.W.2d 78, 80 (Minn. App. 1985) (where an action to compel arbitration is treated as a declaratory judgment action and the action determines the parties' rights and liabilities, resulting judgment is appealable), *review denied* (Minn. Sept. 26, 1985).

To obtain discretionary review of a nonfinal order in an arbitration proceeding, the aggrieved party must establish irreparable damage. *Miyoi*, 293 Minn. at 378, 196 N.W.2d at 310. Appellant argues discretionary review is warranted because of the potential collateral estoppel effect of the April 11, 1996, order on appellant's claims in a pending federal district court action. Respondents are not parties to the federal action, and that action appears to involve issues beyond the scope of the state arbitration proceeding. Appellant has not established that the April 11, 1996, order simply directing arbitration to proceed will have any collateral estoppel effect on the federal litigation.

IT IS HEREBY ORDERED:

1. This appeal is dismissed.

2. Appellant's motion for discretionary review is denied.

3. The Clerk of Appellate Courts shall provide copies of this order to the Honorable Delila F. Pierce, counsel of record, and the court administrator.

Dated: June 11, 1996

BY THE COURT

s/Edward Toussaint
Chief Judge

AW/dr

EXHIBIT Q

STATE OF MINNESOTA
IN SUPREME COURT

Brian L. Honn,

Petitioner,

v.

R.J. Steichen & Company and John E. Feltl,

Respondents.

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS

Appellate Court No. C5-96-980

Date of Filing of Court of Appeals Decision: June 11, 1996

Rebecca E. Bender, Esq. , #139075
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEY FOR PETITIONER
BRIAN L. HONN

TO: The Supreme Court of the State of Minnesota:

The Petitioner Brian L. Honn requests Supreme Court review of the June 11, 1996 decision of the Court of Appeals.

1. **Statement of legal issues and their resolution.**

As the Minnesota Court of Appeals refused to hear the appeal of the District Court's April 11 and April 15, 1996 Orders, and refused to grant Honn's Motion to file a Petition for Discretionary Review, the Court of Appeals has not addressed the issues set forth in Honn's Statement of the Case, including:

a. Whether the state court has jurisdiction to lift a stay of the arbitration proceedings in a National Association of Securities Dealers, Inc. ("NASD") forum once the NASD has been named as a party in a federal court action; and

b. Whether the state court is allowed to "preempt" the decision of a jury in a federal court action alleging violations of the United States Constitution and violations of federal antitrust law against the NASD prior to Honn having an opportunity to present his claims to a jury.

The additional issue which has now been raised is whether the Court of Appeals has jurisdiction to hear this appeal.

2. **Statement of the criteria to support the petition.**

R.C.A.P. 117, Subd. 2 (a), (c) and (d) provide the criteria.

3. **Statement of the case (facts and procedural history).**

Brian Honn brought an arbitration proceeding against his former employer R.J. Steichen & Company ("Steichen"), and its President. Following the conclusion of that arbitration proceeding in an NASD forum, where Brian Honn as a securities broker licensed in the United States was required to have his claims against his former employer heard, Honn brought a Motion to Vacate the Arbitration Award, due, primarily to the prejudice and bias in that proceeding. Hennepin County Court Judge Pierce granted Honn's Motion to Vacate in January of 1995, finding that Honn was denied a non-prejudiced, non-biased hearing. The primary problem with the first hearing was that an NASD official testified voluntarily on behalf of NASD member Steichen, not pursuant to a valid subpoena and contrary to admitted NASD policy. After other problems with the NASD forum, Judge Pierce issued an Order stating in relevant part:

> That [as] similar issues to those which required the vacatur previously are now present again, this Court is hereby ordering that the rehearing of the arbitration be and hereby is stayed pending the resolution of Plaintiff Honn's litigation against the NASD, due to the NASD's apparent inability to provide Mr. Honn with a fair, unbiased and nonprejudiced hearing. (Emphasis added.) (November 2, 1995 Order)

On January 23, 1996, the Court stated:

> . . . once the Court's general equity jurisdiction has been invoked, it may stay an arbitration proceeding on the ground of bias or prejudice. To permit arbitration to proceed under such circumstances

would be futile since the award would almost certainly be vacated. Rose v. Giamatti, 1989 Ohio App. LEXIS 2542 (1989) . . .

. . . The Court has been asked to stay an arbitration proceeding in a forum which has previously been found, by this Court, to be prejudicial to him in which, in all likelihood, based upon the facts presented to the Court, will be again. . . .

On December 31, 1995, Steichen filed its Motion to Compel Arbitration. On February 28, 1996, Honn notified the Court, via Affidavit, of litigation which he had commenced against the NASD and the Securities and Exchange Commission on constitutional, antitrust and other bases, due to Honn's continuing inability to receive a non-prejudiced hearing.

The hearing which resulted in the April 11 and April 15, 1996 Orders, took place on Monday, March 4, 1996, not on January 29, 1996. On April 11, 1996 the District Court lifted its stay of the arbitration proceeding. On May 15, 1996, Honn filed his Notice of Appeal with the Clerk of Appellate Courts. After receiving Steichen's Motion to Dismiss for Lack of Jurisdiction, Honn responded with his Motion to File Petition for Discretionary Review, and Memorandum in opposition to Steichen's Motion.

The Court of Appeals' June 11, 1996 Order fails to address the following key facts:

The April 11, 1996 Order is part two of the November 2, 1995 Order. Honn, who was seeking a stay of the NASD arbitration pending the outcome of his federal court case against the NASD would have no reason to appeal the November 2, 1995 Order which granted the stay. To examine the April 11 (15), 1996 Order in isolation is to ignore the combined effect of the Orders.

In addition, the Minnesota Court of Appeals failed to address the very basic and key fact that Mr. Honn's constitutional rights and rights pursuant to the federal antitrust laws raised against the NASD were being determined by a state court, which operated to effectively eliminate Honn's right to pursue these claims in the court of exclusive jurisdiction. Mr. Honn is alleging that he is unable to obtain a fair, non-prejudiced hearing before the NASD. To state that the State Court Judge's Order sending this matter back to the NASD in light of these pending allegations in federal court does not determine the merits of the claim in the arbitration proceeding is to ignore the forest for the trees. See Eckblad v. Farm Bureau Mutual Ins. Co., 371 N.W.2d 78 (Minn. Ct. App. 1985), pet. for rev. denied (Minn. Sept. 26, 1985), which is analogous to the case at bar. Here, the ultimate question in the federal court action, namely whether Mr. Honn's rights to a non-prejudiced hearing have been and are continuing to be undermined, is one of the issues which Judge Pierce has decided.

Another "fact" which was not addressed by the Minnesota Court of Appeals is the preemption issue. To force Honn to go back to arbitration in a forum which he believes violates his constitutional rights, is in effect taking away his rights. AMF Pinspotters v. Harkins Bowling, Inc., 110 N.W.2d 348 (Minn. 1961), held that issues arising under federal antitrust laws, are exclusively within the jurisdiction of the federal courts. General Talking Pictures Corp. v. DeMarce, 279 N.W. 750 (Minn. 1938). Many other courts have recognized that state courts as well as federal courts have a duty to guard and enforce every right secured by the Constitution. Book Tower Garage v. Local No. 415 Intern. Union, United Auto. Workers of America, 295 N.W. 320 (Mich. 1941) ; see also State for Benefit of Employees of State Penitentiary v. Jensen, 331 N.W.2d 42 (N.D. 1983); Watling, Lerchen and Company, Inc. v. Ormond, 272 N.W.2d 614 (Mich. App. 1978), which held,

inter alia, that where a duty was created by the Securities Exchange Act of 1934 federal courts have exclusive jurisdiction.

The Court of Appeals also did not address the fact that the District Court was on notice concerning the constitutional, antitrust and other claims which had been raised by Honn prior to the District Court ordering him back to the forum which violates his rights. Moreland Corp. v. Retail Store Employees Union , 114 N.W.2d 976 (Wis. 1962).)

Finally, the Court of Appeals refused to grant discretionary review of what it considered to be a non-final order, due to the fact that it believed Mr. Honn had not established irreparable damage, citing to Miyoi v. Gold Bond Stamp Company Employees Retirement Trust, 196 N.W.2d 309, 310 (1972). The Court of Appeals focused on one aspect of Honn's argument, holding that there would not be a potential collateral estoppel effect of the April 11, 1996 Order on Honn's claims in a pending federal district court action. That "collateral estoppel effect" has already begun to occur. In federal court, on a Motion to Dismiss, United States Magistrate Judge Mason has indicated that he intends to abide by the Order of State Judge Pierce on whether the NASD forum is prejudiced or not. District Court Judge Pierce was not and could not have been presented with the broad question of whether Honn's constitutional rights were violated, or whether the NASD was involved in antitrust or other violations against Honn. (The NASD is not a party in the State Court proceeding.) (Portion of Judge Mason transcript at conclusion of Honn's Appendix.)

4. **A brief argument in support of petition.**

In Honn's case, the power of the NASD to favor its member firms over individual brokers has gotten out of hand and has denied Honn his constitutional and other rights. All

Mr. Honn is seeking is to have a federal court and jury determine his exclusively federal court claims. The Petitioner seeks an order granting review of the decision of the Court of Appeals.

Dated: July 10, 1996

/s/

Rebecca E. Bender, Esq.
Rebecca E. Bender & Associates, P.A.
Minnesota Law Center
514 Nicollet Mall, Suite 570
Minneapolis, Minnesota 55402-1021
(612) 332-6220

ATTORNEYS FOR PETITIONER

EXHIBIT R

STATE OF MINNESOTA

IN SUPREME COURT

C5-96-980

Brian L. Honn,

Appellant,

vs.

R. J. Steichen and Company, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Brian L. Honn for further review be, and the same is, denied.

Dated: August 6, 1996

BY THE COURT:

s/A.M. Keith
Chief Justice

EXHIBIT S

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

BRIAN L. HONN,

Plaintiff,

v.

NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC. and SECURITIES AND EXCHANGE COMMISSION,

Defendants.

CIVIL NO. 3-96-182

REPORT AND RECOMMENDATION

Each of the Defendants brought a Motion to Dismiss the Complaint pursuant to Rules 12(b)(1) and 12(b)(6). The case has been referred to the undersigned United States Magistrate Judge for a Report and Recommendation pursuant to 28 U.S.C. § 636(b)(1)(B).

By Report and Recommendation dated June 20, 1996, this Court recommended that the Motion of Defendant Securities and Exchange Commission to Dismiss be granted [Docket No. 28], because the only relief sought from the SEC was damages, and counsel for Plaintiff had advised that Plaintiff "is willing to withdraw his existing claims for damages against the Commission." (Plaintiff has appealed from that Report and Recommendation.) Ruling was reserved on the Motion of Defendant National Association of Securities

Dealers, Inc. ("NASD") to Dismiss [Docket No. 13], to learn whether Plaintiff would prevail in his efforts at having the decision of the state district court reversed on appeal. The Court now recommends that proceedings herein be stayed pending conclusion of arbitration proceedings, and that the NASD Motion to Dismiss be denied without prejudice.

This matter is characterized by a prolix Complaint, and a complicated procedural history. We briefly outline the salient points.

Plaintiff has a dispute with R.J. Steichen, Inc. in which he alleges breach of contract and defamation. Steichen is licensed by Defendant National Association of Securities Dealers ("NASD"). An arbitration was held under the auspices of the NASD. Plaintiff prevailed, but recovered damages in an amount he deemed insufficient. He contended that this was the result of bias and improper procedures in the arbitration proceeding. He commenced an action in state court, and was successful in having the arbitration award set aside. A new arbitration was scheduled.

Believing that a fair hearing could not be had in the hearing as then scheduled, Plaintiff again sought relief in the state district court. The state court granted preliminary relief, then ultimately concluded that a fair hearing could be had. Thus, in April, 1996, it issued its order compelling arbitration between Plaintiff and R.J. Steichen. Plaintiff sought review of that Order, but the Minnesota Court of Appeals refused to grant a petition for review, and the Minnesota Supreme Court has denied review. The order of the state district court compelling arbitration remains in effect, but has not yet been complied with by any party.

Meanwhile, Plaintiff commenced this action in federal court. The Complaint alleges that Plaintiff was denied a fair hearing in his arbitration dispute with R.J. Steichen, Inc. Plaintiff seeks "damages due to his not being able to have a non-prejudiced hearing on his claims" against R.J. Steichen,

and costs and attorneys' fees associated with efforts to obtain such a hearing.

At a minimum, permitting the arbitration proceedings to be concluded will assist the federal court in learning whether Plaintiff is in fact "not able to have a nonprejudiced hearing on his claims" and if so whether he has suffered damages as a result. While there may be good reasons why the Motion of NASD to Dismiss Plaintiffs Complaint should be granted, as a matter of judicial economy, it is preferable that the Court defer consideration of such issues until the arbitration proceedings are concluded.

Plaintiff has exhausted his Minnesota remedies of appeal from the state district court order that arbitration commence, but neither party has complied with the Order. At the hearing in this matter on June 7, 1996, the parties were expressly advised that the arbitration proceedings should go forward. Transcript of proceedings, pp. 69-70. [Docket No. 32].[1]

Plaintiff wishes to defer the arbitration until the United States Supreme Court takes final action on Plaintiffs proposed (but not yet commenced) application for relief from that court, but has failed to persuade the state district court that such relief should be granted. NASD professes to be ready to commence the arbitration proceeding, but it has neither scheduled the hearing, nor said that it will defer. While it is true that there remain some procedural avenues for further appeal, they would not appear to be of sufficient substance to warrant further delay in the commencement of the arbitration

---

[1] "Meanwhile I see no reason whatsoever why the arbitration proceedings should not go forward. Nothing that this Court is going to do will affect that. This Court expressly declined to take an action which would delay that proceeding and believes that that is committed solely and exclusively to the state district court..... Given the order of the district court at this time it is clear that the district court of the state has thought about it and concluded the arbitration should go forward, that there is not unfairness if it goes forward, so nothing that this Court intends to do or will do is going to affect that."

proceeding. In any event, that decision is for the arbitrators or the State District Court, not the United States District Court.

RECOMMENDATION

For the foregoing reasons, it is now recommended that the United States District Court stay further proceedings in this matter until the arbitration proceedings between Plaintiff and R.J. Steichen, Inc. are finally concluded, and that the Motion to Dismiss of National Association of Securities Dealers, Inc. [Docket No. 13] be denied without prejudice.

Dated: October 21, 1996

s/s
JOHN M. MASON
United States Magistrate Judge

Pursuant to Local Rule 72.1(c)(2), any party may object to this Report and Recommendation by filing with the Clerk of Court, and by serving upon all parties by November 5, 1996, written objections which specifically identify the portions of the Report to which objections are made and the bases for each objection.

Unless the parties stipulate that the District Court is not required by 28 U.S.C. § 636 to review a transcript of the hearing in order to resolve all objections made to this Report and Recommendations, the party making the objections shall timely order and file a complete transcript of the hearing by November 5, 1996.